DOCKET

No. 09-273

Title:	Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Petitioner v. Anthony Cardell Haynes
Docketed:	September 2, 2009
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(07-70004)
Decision Date:	March 10, 2009
Rehearing Denied:	June 2, 2009

---Date---	---------Proceedings and Orders----------
Aug 31 2009	Petition for a writ of certiorari filed. (Response due October 2, 2009)
Sep 21 2009	Order extending time to file response to petition to and including November 2, 2009.
Oct 26 2009	Brief of respondent Anthony Cardell Haynes in opposition filed.
Oct 26 2009	Motion for leave to proceed in forma pauperis filed by respondent Anthony Cardell Haynes.
Nov 6 2009	Reply of petitioner Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed.
Nov 9 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 30 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	Record Requested .
Dec 31 2009	Record received from U.S. District Court Southern District of Texas Houston Division (4 boxes and 1 CD volume of the printed record on appeal).
Jan 11 2010	DISTRIBUTED for Conference of January 15, 2010.
Jan 11 2010	Record received from U.S. Court of Appeals for the Fifth Circuit. (one envelope)
Jan 19 2010	DISTRIBUTED for Conference of January 22, 2010.
Feb 16 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 22 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 22 2010	The petition for certiorari is GRANTED. The judgment is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion. Opinion per curiam. (Detached Opinion)

PETITION FOR WRIT OF CERTIORARI

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(1)

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No. _____

In the Supreme Court of the United States

NATHANIEL QUARTERMAN,
Petitioner,
v.
ANTHONY CARDELL HAYNES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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FORMER CAPITAL CASE—QUESTIONS PRESENTED

Is a capital defendant entitled to a new trial under *Batson v. Kentucky*, 476 U.S. 79 (1986), even where there has been no judicial finding of a racially motivated peremptory strike?

A. Specifically, does this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire firsthand?

B. Was this purported right to an automatic new trial "clearly established" under this Court's precedents at the time of trial in 1999, as required under the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2254(d)(1))? And does this purported right prevent federal courts from applying the presumption of correctness to the state court finding that the peremptory strike was not racially motivated, as required under the AEDPA (28 U.S.C. § 2254(e)(1))?

LIST OF PARTIES

Petitioner is Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Respondent is Anthony Cardell Haynes, a prisoner currently in the custody of the Texas Department of Criminal Justice.

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In the
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NATHANIEL QUARTERMAN,
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PETITION FOR WRIT OF CERTIORARI

Peremptory strikes are entirely constitutional so long as they are not motivated by either race or sex. Accordingly, this Court has never held—or even suggested—that a convicted criminal is entitled to a new trial under *Batson v. Kentucky*, 476 U.S. 79 (1986), absent a judicial determination that a peremptory strike was based on discriminatory intent. Yet that is precisely what the court of appeals ordered below.

Anthony Haynes confessed to the 1998 murder of a police officer. Prior to his capital murder trial, the prosecutor explained that he struck a prospective juror based on her friendly demeanor towards defense counsel, and not her race. The trial judge credited this explanation, and thus rejected a *Batson* objection by defense counsel, based on the prosecutor's unrebutted statement about the juror's demeanor.

The court below nevertheless granted habeas relief and awarded Haynes a new trial (a decade after the first one) despite the fact that no court has ever found a racially motivated peremptory strike in this case. The court did so solely on the ground that the trial judge heard the prosecutor's explanation for the strike and defense counsel's response, but did not personally observe the voir dire as well. This holding fundamentally misunderstands the purpose of *Batson* and the precedents of this Court—and, in particular, is based on a mistaken reading of this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

The purpose of *Batson* is to forbid racially motivated peremptory strikes. Accordingly, a *Batson* challenge turns on the sincerity—not the accuracy—of the prosecutor's reason for striking a prospective juror. The Court has recognized that the credibility of the prosecutor—completely ignored by the court below—is the key issue in determining intent under *Batson*. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality op.). And it has specifically recognized that a trial court need not personally observe a prospective juror's demeanor in order to credit a prosecutor's explanation for striking the juror on that basis. *See Rice v. Collins*, 546 U.S. 333, 341 (2006). Nothing in *Snyder* contradicts this established framework.

The error below is compounded by the deferential lens through which federal habeas courts must review *Batson* challenges under the AEDPA. As the district court noted, the theory urged by Haynes (and later adopted by the Fifth Circuit) was nothing more than "a

vehicle to remove this case from AEDPA deference." 2007 WL 268374, at *16 n.10; App., at 80.

The mistaken application of this Court's recent decision in *Snyder* warrants the special remedy of summary reversal. *See Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam). Alternatively, the Court should grant the petition for writ of certiorari and reverse.

OPINIONS BELOW

The Fifth Circuit panel opinion granting habeas relief is reported as *Haynes v. Quarterman*, 561 F.3d 535 (CA5 2009) ("*Haynes II*"). App., at 1-12. The Fifth Circuit order denying Quarterman's timely petition for rehearing en banc is unreported. App., at 180-81.

The Fifth Circuit panel opinion certifiying appealability on the *Batson* challenge is reported as *Haynes v. Quarterman*, 526 F.3d 189 (CA5 2008) ("*Haynes I*"). App., at 13-40. The district court opinion denying the federal habeas petition is unreported. *Haynes v. Quarterman*, No. H-05-3424, 2007 WL 268374 (S.D. Tex. Jan. 25, 2007). App., at 41-133.

The orders of the Harris County District Court and the Texas Court of Criminal Appeals denying state habeas relief in this matter are unreported and unavailable online. App., at 134-53, 154-55.

This Court's order denying Haynes's petition for writ of certiorari to the Texas Court of Criminal Appeals on direct appeal is reported at *Haynes v. Texas*, 535 U.S. 999 (2002) (mem.).

The decision of the Texas Court of Criminal Appeals affirming the conviction and sentence on direct appeal

is unreported and unavailable online. *Haynes v. State*, No. 73,685 (Tex. Crim. App. 2001). App., at 156-79.

JURISDICTION

A panel of the United States Court of Appeals for the Fifth Circuit issued its decision granting habeas relief on March 10, 2009. The Fifth Circuit denied Quarterman's timely petition for rehearing en banc on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

STATEMENT OF THE CASE

Anthony Haynes is in prison for the 1998 capital murder of Houston Police Officer Kent Kincaid. Haynes shot Kincaid in the face after Kincaid, who was unarmed and not in uniform, told Haynes he was a police officer. Kincaid died hours later, leaving behind a wife and two young children.

Haynes confessed to shooting Kincaid and was subsequently tried for capital murder before Harris County District Judge Jim Wallace. Jury selection began on August 16, 1999 and consumed 17 days, during which time 118 prospective jurors were questioned by the prosecution and defense counsel. 1.RR.8-24. Judge Wallace presided at the beginning of the selection process, when the venire members were addressed and questioned as a group. For reasons unexplained in the record, Judge Lon Harper presided over the next stage, when the lawyers questioned the venire members individually. Judge Wallace then presided over the final stage of jury selection, when both sides exercised their peremptory strikes.

The State exercised four of its thirteen peremptory strikes on black venire members, including L.V. McQueen and Betty Owens. 22.RR.15. Haynes struck one of the two black venire members remaining, and the other served on the jury. 22.RR.16.

At the close of jury selection on September 13, Haynes—who is black—raised a *Batson* challenge to the State's four strikes of black venire members.

22.RR.14-15. Only the peremptory strike against Owens is at issue in this petition.

Under *Batson*, trial courts conduct a three-step process to assess challenges to peremptory strikes:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett, 514 U.S., at 767.

The prosecutor, Mr. Vinson, explained that he struck the first two black venire members because they expressed hesitation regarding imposition of the death penalty. App., at 184-86. Judge Wallace credited this explanation. App., at 185-86. The court also credited Vinson's explanation that he struck McQueen because his verbal responses and demeanor suggested he too was "very weak" on the death penalty. App., at 186-87.

Finally, the prosecutor explained that he struck Ms. Owens because of her demeanor during voir dire: she had a "humorous" attitude, her body language belied her verbal answers, and she was so friendly to defense counsel (Mr. Jones) that Vinson was "sure that Mr. Jones reasonably expected us to strike" Owens. App., at 187-88. Notably, Jones did not dispute Vinson's assessment of Owens's demeanor; he argued only that Vinson's perception of defense counsel's view towards

Owens was mistaken. App., at 188. Jones also noted that the written questionnaire answers and verbal responses offered by Owens suggested she would be neutral or favorable toward the State. *Id.* After hearing the prosecutor's explanation and defense counsel's response, Judge Wallace accepted the prosecutor's reason for striking Owens. App., at 189.

Having overruled the *Batson* challenge, Judge Wallace seated the jury. Haynes was convicted of capital murder and sentenced to death. On direct appeal, the Texas Court of Criminal Appeals held that the record supported the prosecutor's reasons for striking the four black venirepersons. App., at 169-72.

The Court of Criminal Appeals separately addressed Haynes's complaint on appeal that Judge Wallace erred by adjudicating the *Batson* challenge when he had not presided over voir dire—an objection Haynes did not make at trial. The court rejected the argument that Judge Wallace's failure to observe voir dire categorically precluded him as a matter of law from evaluating the credibility of the prosecutor's asserted race-neutral reasons:

> We do not agree [] that a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge. There are many factors which a trial judge—even one who did not preside over the voir dire examinations—can consider in determining whether the opponent of the peremptory strikes has met his burden. These include the nature and strength of the parties' arguments during the *Batson* hearing and the

> attorneys' demeanor and credibility. And, when necessary, a trial judge who has not witnessed the voir dire may refer to the record.

App., at 173-74. The court affirmed the conviction and sentence in all respects. This Court denied Haynes's petition for writ of certiorari on direct appeal.

After the Texas courts denied his state habeas claims, Haynes sought federal habeas relief under 28 U.S.C. § 2254. In a thorough opinion, U.S. District Judge Sim Lake rejected Haynes's various claims, including his *Batson* complaint:

> While it would be useful to have the same judge who viewed the prospective jurors' demeanor, facial expressions, and attitude rule on *Batson* issues, Haynes has not shown that the Constitution requires it. Instead, his claim seems to be a vehicle to remove this case from AEDPA deference. The Supreme Court has not held that 28 U.S.C. § 2254(e)(1) does not apply when the trial judge did not observe jury selection. Here, the trial court did not see the particular jurors, but still could observe and make credibility determinations about the prosecutor's motive in making the peremptory strikes.

2007 WL 268374, at *16 n.10; App., at 80.

The Fifth Circuit certified appealability as to the peremptory strikes of McQueen and Owens and subsequently granted habeas relief. Based on its reading of *Snyder*, the panel found what it termed a "*Batson* violation" as to Owens. *Haynes II*, 561 F.3d, at

541 n.2. But the panel did *not* conclude that the prosecutor struck Owens for racial reasons. Instead, it concluded that the trial court made its *Batson* ruling "from the cold paper record," and that "no court, including ours, can now engage in a proper adjudication of [Haynes's] demeanor-based *Batson* challenge . . . because we will be relying solely on a paper record." *Id.*, at 541. It also concluded that "we cannot . . . apply AEDPA deference to the state court, because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." *Id.* Having found a "*Batson* violation" as to Owens, the court below declined to consider Haynes's *Batson* complaint as to McQueen. *Id.*, at 541 n.2. It ordered the State to retry Haynes—who was convicted a decade ago—or release him. *Id.*, at 541.

REASONS FOR GRANTING RELIEF

I. THIS UNIQUE CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). The Court has invoked this special remedy to address significant misinterpretations of *Batson* and federal habeas law in previous cases, *see Purkett*, 514 U.S., at 765, and it should do so in this case as well.

Here, as in *Purkett*, "the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record." *Id.*, at 769. Instead, the panel granted habeas relief to Haynes—who admitted guilt and was convicted by a properly selected jury—on

a novel theory that contradicts this Court's *Batson* precedents, conflicts with other federal and state courts, and ignores the AEDPA's restrictive lens through which federal habeas courts must view state court factual findings and legal conclusions.

Summary reversal would allow the Court to clarify the law in these important areas and prevent injustice in this case while conserving the Court's scarce resources. This remedy is especially appropriate here, to ensure that lower courts do not persist in misconstruing this Court's recent ruling in *Snyder*.

II. The Decision Below Defies This Court's Precedents.

A. The Decision Below Is a Significant Departure From This Court's *Batson* Jurisprudence.

Step three of *Batson* "involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S., at 338 (quoting *Purkett*, 514 U.S. at 768). In this case, the State's reasons for striking Owens and McQueen focused on their demeanor during voir dire. Judge Wallace observed firsthand the prosecutor's explanations for striking both prospective jurors and found those race-neutral explanations credible.

The court below held that Judge Wallace's *Batson* ruling was based solely on "the cold paper record" and was therefore invalid *per se*. *Haynes II*, 561 F.3d, at 541. That holding ignores the trial court's firsthand

observation of the most relevant demeanor—that of the attorney exercising the strike. *See Hernandez*, 500 U.S., at 365. It contradicts *Rice*, which recognizes that a trial court may credit a peremptory strike based on juror demeanor the trial court did not personally observe. 546 U.S., at 341. And it disregards both *Purkett* and *Batson* itself. In short, if the decision below was correct, then *Batson* and its progeny must all be wrong.

1. *Rice v. Collins*

In *Rice*, the Court upheld a peremptory strike that was partly based on juror demeanor (eye-rolling) the trial court acknowledged it did not observe. *See id.*, at 341-42. Although the trial judge might have rejected that explanation, given its inability to independently confirm the demeanor alleged by the prosecutor, this Court held that the trial court was not required to "conclude the prosecutor lied about the eye rolling":

> Viewing the panel majority's concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination.

Id. The panel decision below cannot be squared with this conclusion in *Rice*—namely, that a trial court decision to credit a strike based on juror demeanor merits deference, even though the trial court did not personally observe the juror's demeanor.

2. *Hernandez v. New York*

This Court has long recognized that the demeanor of *counsel*—and not that of the jurors themselves—is generally the "best evidence" in assessing a race-neutral explanation at step three of *Batson*:

> [I]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge will be believed. There will seldom be much evidence bearing on that issue, and *the best evidence often will be the demeanor of the attorney who exercises the challenge.* As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S., at 365 (citations omitted, emphasis added).

The lower court's conclusion that a trial judge cannot evaluate the credibility of a demeanor-based strike unless the judge observed the cited demeanor of the prospective *juror* ignores the point in *Hernandez* that the most relevant demeanor to observe is that of the striking *attorney*. *Haynes II*, 561 F.3d, at 540 ("[W]e read *Batson* to require the application of the trial court's observations of individual jurors if relevant

to the prosecutor's explanation."). Similarly, the panel's assertion that the trial court made the credibility determination entirely "from the cold paper record," *id.*, at 541, disregards the trial court's firsthand observation of both the prosecutor's demeanor in explaining his race-neutral reasons as well as defense counsel's response. As the district court correctly concluded, Judge Wallace "did not see the particular jurors [during voir dire], but still could observe and make credibility determinations about the prosecutor's motive in making the peremptory strikes." 2007 WL 268374, at *16 n.10; App., at 80.

3. ***Purkett v. Elem***

Purkett, like this case, involved a lower court's misunderstanding of *Batson* in the habeas context. In that case, the court of appeals had interpreted this Court's statement that the race-neutral reason given at step two of a *Batson* hearing must be "related to the particular case to be tried," 514 U.S., at 768-69 (quoting *Batson*, 476 U.S., at 98), to conclude that a trial court may not proceed to the credibility evaluation at step three when a prosecutor offers irrelevant or implausible (but facially race-neutral) grounds at step two, *id.*, at 767. This Court rejected the court of appeals's interpretation of *Batson*:

> [T]o say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion

> regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Id., at 768 (emphasis in original). Likewise, a trial court's failure to observe juror demeanor that is cited as a race-neutral basis for striking the juror may affect the credibility of counsel's explanation, but it does not render the court categorically ineligible to assess counsel's credibility. The Fifth Circuit ignored *Purkett*'s identification of the trial court as the ultimate arbiter of credibility in *Batson* challenges.[1]

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1. Significantly, the dissent in *Purkett* noted that either an appellate court or "a trial court" (as opposed to *the* trial court, *i.e.*, the convicting court) can make a step three credibility finding if the trial court prematurely terminated the *Batson* inquiry:

> [A] new problem arises when [the Court of Appeals] (or, as in today's case, this Court) conducts the step-two inquiry and decides that the prosecutor's explanation was sufficient. Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson*? Again, I think the question *whether the Court of Appeals decides, or whether it refers the question to a trial court,* should depend on the state of the record . . . .

514 U.S., at 776 (Stevens, J., dissenting) (emphasis added). If a different trial court judge or an appellate court may make a *Batson* credibility determination in the first instance based solely on the appellate record, then surely a trial court may rely on its own firsthand observation of the "best evidence" of credibility—the demeanor of counsel in explaining the reason for the strike.

4. *Batson v. Kentucky*

Batson stated that a court adjudicating a challenge to peremptory strikes must use "such circumstantial and direct evidence of intent *as may be available.*" 476 U.S., at 93 (emphasis added). In this case, the trial court considered the available evidence, which included its firsthand observation of the "best evidence"—the prosecutor's explanation and demeanor. *Batson* does not require more; indeed, the Court's disposition in that case further refutes the Fifth Circuit's reasoning.

The eponymous Mr. Batson was convicted of theft several years before his case reached the Supreme Court.[2] The prosecutor did not provide any race-neutral reasons for the peremptory strikes at issue, for the obvious reason that the law in effect at time of trial did not require any such explanations. *Id.*, at 100. The Court established such a right for the first time in *Batson*. Yet the Court did not award Batson himself a new trial. The Court instead remanded the case to give the prosecutor an initial opportunity to provide

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2. It is not clear what year Batson was tried. The Court's opinion does not indicate the year of trial, and the decisions below were unpublished and are unavailable online. Media sources report the year of conviction as either 1982 or 1983. *Man Whose Conviction Overturned By U.S. Supreme Court Pleads Guilty*, AP ONLINE, Oct. 30, 1986, *available at* 1986 WLNR 1436129 (1982 conviction); *When it Comes to Race, Batson Case Rules*, dallasnews.com, Jan. 24, 2006, http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/082105dnprobaston.7d30537f.html (1983 conviction). Batson's own certiorari petition indicates he was tried in 1984. The difference between the reported dates is not significant.

race-neutral reasons. *Id.* Notably, the Court did not state that only the original trial judge could assess the legitimacy of those reasons (presumably because that judge might not have been available in any event).[3]

Even assuming the original trial judge had been available, that judge hardly could have been expected to recall the demeanor of prospective jurors struck before trial several years earlier. Given that *Batson* provided the first practical method to challenge peremptory strikes on racial grounds, the trial judge had little reason to note—let alone recall years later—the demeanor of every venireperson struck before Batson's trial. By nevertheless remanding to assess the legitimacy of those strikes, rather than granting Batson a new trial, the Court rejected the remedy imposed by the court below in this case.

* * *

The panel opinion cited several decisions recognizing that the "presumed observation" of prospective jurors in voir dire by trial judges supports the great deference that their *Batson* credibility determinations merit on appeal. *Haynes II*, 561 F.3d, at 541 (citing, inter alia, *Rice*, 546 U.S., at 336). But there is a significant difference between relying on a trial court's observation of the venire as a *sufficient* basis for deferring to its credibility determination, on the one hand, and declaring such trial-court observation *necessary* to adjudicate the legitimacy of a

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3. No *Batson* hearing was held on remand because Batson pleaded guilty following the Court's decision. AP ONLINE, *supra* note 2.

demeanor-based strike, on the other hand—especially considering that the "best evidence" on the issue (the statements of the attorney) will always be available to the trial court. As the federal district court explained: "While it would be useful to have the same judge who viewed the prospective jurors' demeanor . . . rule on *Batson* issues, . . . the Constitution [does not] require[] it." 2007 WL 268374, at *16 n.10; App., at 80.

B. Both the Fifth and Seventh Circuits Have Misinterpreted *Snyder v. Louisiana*.

To support its novel holding, the Fifth Circuit relied primarily on *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008). But *Snyder* never suggested that *Batson* entitles a defendant to a new trial in the absence of any finding of improper motive. The misreading of *dicta* in *Snyder* by both the Fifth and Seventh Circuits has caused both courts to undermine established practices for assessing *Batson* challenges.

At Snyder's state-court trial, two race-neutral reasons for striking a juror were given: one involving the juror's "nervous" demeanor, and the other involving his teaching obligations. *Id.*, at 1208. The trial court overruled Snyder's *Batson* objection without comment. *Id.* This Court found the teaching-related reason pretextual, *id.*, at 1209-12, but not the demeanor-based reason. However, the Court declined to presume that the trial court credited the demeanor-based explanation when the trial court's conclusory ruling could reflect its choice to rely entirely on the teaching-related explanation. *Id.*, at 1209. That holding does not apply to this case, in which no court has found the prosecutor's sole reason—which was based "entirely on

demeanor"—pretextual. 561 F.3d, at 539. By applying *Snyder* far beyond its narrow holding, the Fifth Circuit—like the Seventh—has significantly altered *Batson* protocol as to demeanor-based strikes.

The *Snyder* majority asserted that its holding did not abandon the established principle that trial courts' credibility determinations involving strikes based on juror demeanor are entitled to great deference:

> [R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, *but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.* We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,' and we have stated that 'in the absence of exceptional circumstances, we would defer to [the trial court].'"

Id., at 1208 (emphasis added) (quoting *Hernandez*, 500 U.S., at 365-66). This *dicta* was presumably intended simply to reaffirm appellate deference to trial court credibility findings, in response to the dissent's criticism that the majority was "only paying lipservice to the pivotal role of the trial court." *Id.*, at 1213 (Thomas, J., dissenting). But the Fifth Circuit read it to *eliminate* such deference in certain circumstances.

The court below read *Snyder* as a sweeping decision that precludes trial courts from determining the legitimacy of demeanor-based peremptory strikes whenever "the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge." *Haynes I*, 526 F.3d, at 199; *see also Haynes II*, 561 F.3d, at 540 (interpreting *Batson* to require "the trial court's observations of individual jurors if relevant to the prosecutor's explanation."). But "*Snyder* said no such thing." *People v. Bramit*, 210 P.3d 1171, 1184 n.7 (Cal. 2009). *Snyder* held only that a court reviewing a *Batson* challenge to a strike dually justified on both sincere and pretextual grounds may not assume that the trial court credited the valid reason, instead of the pretexual one, if the trial court did not specify its basis for overruling the challenge. 128 S. Ct., at 1209.

The Eighth Circuit, like the California Supreme Court, recognizes that *Snyder* does not require trial courts to make findings on juror demeanor when considering a *Batson* challenge to a demeanor-based strike. *See Smulls v. Roper*, 535 F.3d 853, 860-61 (CA8 2008). The Seventh Circuit, however, reads *Snyder*'s dicta as requiring trial courts to make such explicit findings—even if (unlike in *Snyder*) the demeanor-based reason was the *sole* race-neutral reason given. *See United States v. McMath*, 559 F.3d 657, 661, 665-66 (CA7 2009). The Sixth Circuit had adopted a similar rule even before *Snyder*. *See McCurdy v. Montgomery Co.*, 240 F.3d 512, 521 (CA6 2001) (upholding denial of demeanor-based *Batson* challenge only "because the district court did not merely credit

the explanation of the County," but specifically "found that [the juror] was passive and disinterested").

Snyder supports neither the Fifth Circuit's novel *Batson* rule nor the similar approach taken by the Seventh and Sixth Circuits. Summary reversal is warranted because those circuits (and likely other courts) will continue to misread *Snyder* until the Court clarifies its decision.

III. The Decision Below Conflicts With the Established Practice of Numerous Courts Nationwide That Routinely Order *Batson* Hearings Before Judges Other Than the Original Trial Judge.

Federal appellate courts routinely remand cases originally tried in state court for *Batson* hearings before federal district courts. *See Jordan v. Lefevre*, 293 F.3d 587, 593 (CA2 2002) ("When the *Batson* claim is asserted by a state prisoner petitioning for habeas corpus in federal court, if the state court has not performed this task adequately, the responsibility for assessing the prosecutor's credibility and determining his intent falls on the [federal] district judge."). In those circumstances, the *Batson* challenge is heard by a judge who did not observe voir dire. *See Harris v. Haeberlin*, 526 F.3d 903, 912-14 (CA6 2008); *Brinson v. Vaughn*, 398 F.3d 225, 235 (CA3 2005) (per Alito, J.); *Fernandez v. Roe*, 286 F.3d 1073, 1080 (CA9 2002); *Rosa v. Peters*, 36 F.3d 625, 635 (CA7 1994); *Wilson v. Jones*, 902 F.2d 923, 924 (CA11 1990). The Fifth Circuit's blanket rule conflicts with the view of the six

federal circuits that remand cases tried in state courts for *Batson* hearings before federal judges.[4]

Nor is this conflict latent. The Second Circuit has repeatedly rejected the notion that a judge other than the original trial judge cannot adjudicate a *Batson* hearing on remand involving demeanor-based challenges. *See Guzman v. Duncan*, No. 02-2405, 74 F. App'x 76, 78 (CA2 2003) (unpublished) ("In this case, the reconstruction judge, in addition to finding a clearly articulated reason in the record for the prosecutor's exercise of these two [demeanor-based] challenges, had the opportunity to assess the prosecutor's demeanor as he discussed the other three jurors."), *cert. denied*, 540 U.S. 1119 (2004); *Bryant v. Speckard*, 131 F.3d 1076, 1078 (CA2 1997) (rejecting

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4. Several state appellate courts have also squarely rejected the Fifth Circuit's premise that the *Batson* judge must have personally observed voir dire. *See, e.g., State v. McCord*, 582 S.E.2d 33, 36 (N.C. Ct. App. 2003) ("While the trial judge presiding over the *Batson* hearing in this case was not the same judge who presided over jury selection, he still had the ability to observe the testimony of the prosecutor firsthand."); *People v. Mack*, 538 N.E.2d 1107 (Ill. 1989) (affirming trial court's determination that State's race-neutral reasons for striking jurors were credible (including 5 based on demeanor), although *Batson* judge had not observed voir dire). The California Supreme Court has expressly relied on the federal courts' use of "reconstruction hearings" to conclude that the original trial judge need not preside over a *Batson* hearing on remand. *See People v. Johnson*, 136 P.3d 804, 807 (Cal. 2006) ("Every time a hearing is held in federal district court on habeas corpus review of a state case the hearing will be before someone other than the state trial court judge.").

claim that "reconstruction judge," who had not observed voir dire, could not make credibility determination regarding demeanor-based strike), *cert. denied*, 524 U.S. 907 (1998); *Brown v. Kelly*, 973 F.2d 116, 121 (CA2 1992) (holding that federal district court could, six years after trial, fairly evaluate demeanor-based reasons for striking prospective jurors).

Even when a case is remanded to state court for a *Batson* hearing, the passage of time may make it unlikely that the original trial judge will still be available to make the credibility determination on remand. But that reality has not prevented federal appeals courts from ordering reconstruction hearings instead of new trials.[5] *See, e.g.*, *Coulter v. Gilmore*, 155 F.3d 912 (CA7 1998) (remanding for *Batson* hearing in state court 11 years after voir dire). In one case, the Second Circuit upheld the district court's conclusion that the state courts erred in finding no prima facie *Batson* violation, but vacated the district court's order granting a new trial and instead remanded for a reconstruction hearing, 15 years after the trial, even though the trial judge had since retired. *See Harris v. Kuhlmann*, 346 F.3d 330, 347-49 (CA2 2003).

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5. Nor has the passage of intervening years kept federal habeas courts from remanding cases tried in state courts for *Batson* hearings in federal district court, sometimes decades later. *See, e.g.*, *Jones v. West*, 555 F.3d 90, 102 (CA2 2009) (remanding for *Batson* hearing 10 years after defendant's trial); *Hardcastle v. Horn*, 368 F.3d 246, 261-62 (CA3 2004) (remanding for *Batson* hearing 22 years after trial).

IV. The Decision Below Threatens To Dramatically Complicate Jury Selection Procedures.

The premise underlying the decision below is that a trial court cannot fairly consider a *Batson* challenge to a peremptory strike based on juror demeanor if the court did not observe the demeanor cited. *Haynes II*, 561 F.3d, at 540-41. But this reasoning cannot be squared with the many federal and state decisions recognizing that a trial judge who did not personally observe a juror's demeanor or other non-verbal behavior that is the stated ground for peremptory dismissal may nonetheless consider—and overrule—a *Batson* challenge. *See Rice*, 546 U.S., at 341-42; *United States v. Maxwell*, 473 F.3d 868, 872 (CA8 2007); *State v. Robinson*, 724 N.W.2d 35, 60 (Neb. 2006); *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996); *People v. Munson*, 662 N.E.2d 1265, 1275 (Ill. 1996); *but see Dorsey v. State*, 868 So.2d 1192 (Fla. 2003).

Peremptory challenges are often based on "subtle, intangible impressions." *McCrory v. Henderson*, 82 F.3d 1243, 1248 (CA2 1996). Even when a juror's behavior or demeanor is "related in good faith, [it] may simply not have been seen by . . . the court," or "might not even be present by the time it is called to the court's attention." *Robinson*, 724 N.W.2d, at 60. A rule limiting demeanor-based peremptory strikes to only those involving juror demeanor observed by the trial court would "require[] a trial judge to constantly scan the trial proceedings with eyes like an eagle." *Hatten v. State*, 628 So.2d 294, 297 (Miss. 1993).

The Fifth Circuit's reasoning would require trial courts to both observe and remember every venire member's behavior and demeanor—an impossible task, given the many days and dozens of prospective jurors that often pass between voir dire and a *Batson* hearing. In *Snyder*, the Court noted that a passage of a *single day* between voir dire and the *Batson* hearing may have caused the trial court to forget a prospective juror's demeanor. 128 S. Ct., at 1209. In this case, nearly a month passed between the start of voir dire and the *Batson* hearing, with 118 jurors questioned individually over 17 days.[6] 1.RR.8-30. It would blink reality to expect trial courts to observe and recall every specific instance in which a prospective juror displayed eye contact (or lack thereof), inattention, hostility, boredom, levity, or any number of behaviors or emotions that may prompt a legitimate peremptory strike. Neither the Constitution nor common sense justifies placing such a heavy burden on trial courts.

The Fifth Circuit's reasoning would also preclude remanding for a *Batson* hearing any time the original trial judge has since retired, *see Guzman*, 74 Fed. App'x, at 77 n.1; joined the appellate bench, *see Johnson*, 136 P.3d, at 807; died, *see Brinson*, 398 F.3d, at 228; or simply cannot recall particular instances of demeanor that prompted a peremptory strike years ago. Indeed, a new trial would have to be awarded almost any time a lower court is found to have erred in

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6. The individual voir dire of Ms. Owens took place six days before the *Batson* hearing, with a dozen venire members questioned in the interim. 1.RR.22-24, 30.

applying *Batson*. Because the Fifth Circuit's rule is unworkable and contrary to this Court's precedents, the Court should reverse the decision below.

V. The Refusal of the Court Below To Apply AEDPA Deference Warrants Summary Reversal.

Although it acknowledged the AEDPA's applicability to Haynes's habeas petition, the Fifth Circuit gave no deference to the state court's *Batson* ruling—as to either its legal conclusion or its factual determination. *Haynes II*, 561 F.3d, at 538, 541. In so doing, the court below ignored both relevant prongs of the AEDPA. *See* 28 U.S.C. § 2254(d)(1), (e)(1).

A. The Decision Below Applies a New *Batson* Rule in Violation of the AEDPA's Anti-Retroactivity Principle.

Under the AEDPA, a federal court can act only when a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). But the trial judge's relevant legal conclusion—that his absence from voir dire did not preclude him from hearing Haynes's *Batson* challenge—was not "opposite to that reached by this Court on a question of law." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Rather, it is the decision below that is contrary to established federal law—the interpretation of both *Batson* and the AEDPA.

Any analysis under § 2254(d)(1) must be based on law that was clearly established "at the time the state

court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Here, the relevant cutoff is September 1999—when the trial court overruled the *Batson* challenge. Further, "clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams*, 529 U.S., at 412). No holdings of this Court—let alone its pre-2000 holdings—support the decision below. *See supra* Part II(A).

The Fifth Circuit certified appealibility of Haynes's *Batson* claims "in light of the Supreme Court's decision in *Snyder*," *Haynes I*, 526 F.3d, at 200, and granted habeas relief based on *Snyder*, *Haynes II*, 561 F.3d, at 540-41. But *Snyder* was decided nearly a decade after Haynes's trial. As in *Smulls*, "*Snyder* was not clearly established law at the time of the state courts' rejection of [Haynes's] *Batson* claim and cannot provide the basis for habeas relief under § 2254(d)(1)." *Smulls*, 535 F.3d, at 861. The panel's reliance on *Snyder* blatantly ignores the AEDPA's anti-retroactivity principle.

As the federal district court correctly stated, a trial court's firsthand observation of voir dire is helpful in evaluating a demeanor-based *Batson* challenge, but this Court has never held that the Federal Constitution requires it. 2007 WL 268374, at *16 n.10; App., at 80. Significantly, the Fifth Circuit did not cite a single decision holding that a trial judge cannot assess a prosecutor's demeanor-based reason for striking a juror based on the trial court's firsthand observation of the prosecutor's credibility. By gauging the trial court's legal analysis using *dicta* mostly from

Texas and Fifth Circuit decisions, instead of Supreme Court holdings in effect in 1999, the court below ignored the AEDPA's mandate defining the relevant yardstick as "clearly established" federal law. *See, e.g.*, *Yarborough*, 541 U.S., at 660-61.

B. The Court Below Ignored the Deference to a State Court Factual Determination of Credibility Required by the AEDPA.

The Fifth Circuit also gave no deference to the trial court's factual conclusion that the prosecutor's demeanor-based reason for striking Ms. Owens was credible. App., at 189. In so doing, the court below disregarded not only the plain text of the AEDPA itself, but this Court's precedents implementing the AEDPA's required deference to trial courts' *Batson* decisions.

"The credibility of the prosecutor's explanation goes to the heart of [*Batson*'s] equal protection analysis." *Hernandez*, 500 U.S., at 367. The "ultimate question" of whether the strikes at issue were motivated by discriminatory intent is a "pure issue of fact"; thus, even in cases not subject to the AEDPA's restrictive lens, the trial court's credibility determination is "accorded great deference on appeal." *Id.*, at 364; *see id.*, at 372 (O'Connor, J., concurring). And for cases (like this one) to which the AEDPA applies, the trial court's credibility determination at step three must be "presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see* 28 U.S.C. § 2254(e)(1).

Haynes did not offer such evidence, nor did the Fifth Circuit require any in disregarding the state court's factual finding. Instead, the panel concluded that AEDPA deference was unwarranted "because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." 561 F.3d, at 541. Its focus on the jurors' demeanor ignores not only the trial court's observation of the prosecutor's demeanor, but also the AEDPA's restrictive lens. As the federal district court noted, this Court "has not held that 28 U.S.C. § 2254(e)(1) does not apply when the trial judge did not observe jury selection."[7] 2007 WL 268374, at *16 n.10; App., at 80.

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7. Nor can the Fifth Circuit's decision be justified by its erroneous statement that the Court of Criminal Appeals "concedes there was no trial fact-finding." 561 F.3d, at 541. The fact-finding discussed by the Texas appellate court related to "the demeanor of the veniremembers at issue"—a subject as to which the trial court neither made, nor was required to make, specific findings. *Id.* (quoting *Haynes v. Texas*, App., at 173). The factual finding relevant to Haynes's *Batson* claim was the trial court's credibility determination, which is entitled to a presumption of correctness under the AEDPA. 28 U.S.C. § 2254(e)(1). The Court of Criminal Appeals did not make any factual findings that contradicted the trial court's credibility determination, and it upheld the trial court's *Batson* ruling in its entirety. App., at 173-74. Whatever statements the Court of Criminal Appeals made regarding the deference *it* applied on direct appeal to the trial court's hypothetical findings regarding the veniremembers' demeanor are irrelevant under the AEDPA, which required the Fifth Circuit to defer to the trial court's factual determination that the prosecutor's race-neutral reason for striking Owens was credible.

The Fifth Circuit's misunderstanding of § 2254(e)(1) originates in its misconception of the relevant factual inquiry. The court below viewed the issue at *Batson*'s step three as whether the juror actually exhibited the demeanor alleged. *Haynes II*, 561 F.3d, at 541 ("In this case, the trial court and the state appellate court did not conduct a 'factual inquiry' or a 'sensitive' inquiry into the demeanor-based reasons because neither court applied the relevant observations of the juror's demeanor despite the trial court's role and experience overseeing the individual voir dire."). But the issue at step three is not whether the prosecutor's perception of a juror is accurate, but simply "whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Miller-El*, 537 U.S., at 339; *see Snyder*, 128 S. Ct. at 1207-08; *Rice*, 546 U.S. at 338; *Hernandez*, 500 U.S. at 367.

The *Batson* burden of proving discrimination never shifted from Haynes, *see Rice*, 546 U.S., at 338, nor did the AEDPA burden of rebutting the trial court's factual determination with "clear and convincing" evidence, 28 U.S.C. § 2254(e)(1). The Fifth Circuit's decision eliminating both burdens is supported by neither the text of the AEDPA nor the Court's AEDPA precedents. The Court should not let the decision below stand.

CONCLUSION

The Court should summarily reverse the judgment of the Court of Appeals and remand for that court to address Haynes's *Batson* challenge, giving appropriate AEDPA deference to the trial court's ruling. In the alternative, the Court should grant the petition for writ of certiorari and reverse the judgment below.

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App. 1

[United States Court of Appeals
Fifth Circuit
FILED
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Charles R. Fulbruge III
Clerk]

REVISED MARCH 11, 2009
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-70004

ANTHONY CARDELL HAYNES

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

DENNIS, Circuit Judge:

Petitioner Anthony Cardell Haynes ("Haynes"), a Texas prisoner, appeals the district court's decision to deny Haynes a petition for a writ of habeas corpus that alleges the state prosecutor's use of peremptory challenges was in violation of the Equal Protection Clause of the United States Constitution as prescribed by *Batson v. Kentucky*, 476 U.S. 79 (1986).

The State of Texas charged Haynes with the capital murder of a peace officer who was "acting in the lawful discharge of an official duty[.]" TEX. PENAL CODE § 19.03(a)(1). A jury convicted Haynes of capital murder and answered Texas's special issues in a manner requiring the imposition of a death sentence. After exhausting his state remedies without relief, Haynes filed a federal habeas petition on October 5, 2005, with the United States District Court for the Southern District of Texas. The District Court denied habeas relief in an opinion filed on January 25, 2007. Haynes filed for a certificate of appealability (COA) in this court on May 30, 2007. This panel granted a COA on two issues: "(1) whether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror Owens; and (2) whether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror McQueen." *Haynes v. Quarterman*, 526 F.3d 189, 202-203 (5th Cir. 2008).

In respect to the use of peremptory challenges against prospective jurors McQueen and Owens in the *Batson* context, the relevant facts are as follows: Two different state trial judges took turns presiding over the jury selection process in this case at the state court level. Judge Wallace presided at the beginning of the jury selection process when the jurors were addressed and questioned as a group; Judge Harper presided during the next stage in which the attorneys questioned the prospective jurors individually; and Judge Wallace presided again during the final stage in which peremptory challenges were exercised and when *Batson* challenges were made, considered, and ruled upon. During the *Batson* hearing, the defendant established a *prima facie* case of a *Batson* violation, and the prosecutor justified his use of peremptory challenges against potential jurors McQueen and Owens *solely*[1] on his impression of their demeanor when responding to individual *voir dire* questioning (at which time Judge Wallace was not presiding).

In his direct appeal, Haynes appealed the *Batson* determinations to the state appellate court. On appeal, Haynes noted that: "Judge Wallace, having not observed the voir dire of individual veniremembers, having not observed their demeanor, body language, responses, attitudes, and characteristics, could not assess or scrutinize the veracity of the prosecutor's explanations and observations regarding the reasons for striking these prospective veniremembers." Haynes

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1. The State agrees on appeal that the prosecutor relied solely on demeanor evidence in making these challenges.

also contended that "[a] trial court's determination of a *Batson* challenge must necessarily be based upon the facial validity of the prosecutor's explanation *in light of the trial court's direct evaluation of the venire*, their respective statements, responses and demeanor." (emphasis in original). In this context, Haynes argued that "the trial court erred in concluding that the State exercised its peremptory challenges against minority veniremembers Goodman, Kirkling, McQuuen [sic], and Owens, respectively in a racially neutral manner where these findings are unsupported by the record." He repeats these arguments in his federal habeas petition. His arguments with respect to McQueen and Owens are now properly before this court.

STANDARD OF REVIEW

"As this case comes to us under 28 U.S.C. § 2254, our review is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), which provides that habeas relief may not be granted unless the state court proceeding resulted in 'a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' A merely incorrect state court decision is not sufficient to constitute an unreasonable application of federal law; rather, the decision must be objectively unreasonable." *Virgil v. Dretke*, 446 F.3d 598, 604 (5th Cir. 2006).

ANALYSIS

A. Haynes Did Not Waive His Batson *Challenge and It Is Not Procedurally Defaulted*

The State first contends that Haynes' claim of a *Batson* violation because Judge Wallace did not preside over individual *voir dire* is procedurally defaulted. We disagree. "A state prisoner must present his claims to the state court and exhaust state remedies before seeking federal habeas relief. . . . The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court, either through direct appeal or state habeas proceedings." *Goodrum v. Quarterman*, 547 F.3d 249, 256 (5th Cir. 2008) (internal quotation marks and citation omitted). The state appellate court recognized that Haynes made two related arguments with respect to the fact that Judge Wallace, and not Judge Harper, made the *Batson* determinations; it found only one of them to be procedurally defaulted.

The state appellate court first examined Haynes's argument that the trial judge erred and denied him due process by presiding over the *Batson* hearing even though he had not presided over the *voir dire* examination. With respect to this due process challenge, the state court, on direct appeal, concluded that Haynes procedurally defaulted the argument by failing to raise it before the trial court. The appellate court then proceeded to discuss a related but different argument regarding the effect of Judge Wallace's failure to sit on individual *voir dire* on the state appellate court's review of the trial court's *Batson* determinations. It did not find this argument to be procedurally defaulted and, in fact, considered this argument extensively on the merits. The state appellate court eventually concluded that Haynes was "partly correct" and decided to give the trial court "no

deference" as to its *Batson* determinations. *Haynes v. State*, No. 73,685, slip op. at 17 (Tex. App. Ct. Oct. 10, 2001) (unpublished). Haynes also preserves this later issue in his federal habeas petition. The federal district court addressed this issue on the merits. *See Haynes v. Quarterman*, 2007 WL 268374, at *16 n.10 (S.D. Tex. Jan. 25, 2007) (unpublished). We can now squarely address this issue.

B. *A* Batson *Violation Occurred And Habeas Relief is Required*

A *Batson* challenge involves three steps:

> The Supreme Court has outlined a three-step process for determining whether peremptory strikes have been applied in a discriminatory manner. First, the claimant must make a *prima facie* showing that the peremptory challenges have been exercised on the basis of race. Second, if this requisite showing has been made, the burden shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges. Finally, the trial court must determine whether the claimant has carried his burden of proving purposeful discrimination.

United States v. Bentley-Smith, 2 F.3d 1368, 1373 (5th Cir. 1993). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 128 S.Ct. 1203, 1208 (2008) (internal quotation marks and alteration omitted);

Reed v. Quarterman, --- F.3d ---, 2009 WL 58903, at *16 n.12 (5th Cir. Jan. 12, 2009).

We first consider Haynes's *Batson* claims as to prospective juror Owens. With respect to prospective juror Owens, the State concedes that the defendant made a *prima facie* showing that the peremptory challenge had been exercised on the basis of race.

For the second step, the prosecutors articulated a race-neutral explanation as to Owens based entirely on demeanor. The Supreme Court demands that the trial court especially scrutinize explanations based purely on demeanor. *See Snyder*, 128 S.Ct. at 1208; *see also Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 518 (Tex. 2008); *Goodwin v. State*, 898 S.W.2d 380, 382 (Tex. Ct. App.–San Antonio 1995); *Daniels v. State*, 768 S.W.2d 314, 317-18 (Tex. Ct. App.–Tyler 1988). This demand is logically derived from the underlying rationale for delegating the *Batson* determination to a *trial* court and according it substantial deference – namely, that the trial court is better able to make determinations of demeanor. *See Snyder*, 128 S.Ct. at 1208 ("We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province.") (internal quotations and citations omitted); *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *see also Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Therefore, we accord the trial court the primary role in adjudicating demeanor-based *Batson* challenges because the trial court is in a better position to evaluate those challenges and is not relying, as the appellate court does, solely on the paper record. *See Moody v. Quarterman*, 476 F.3d 260, 272 (5th Cir.

2007) (noting that, according to the Supreme Court, the state court's credibility and demeanor determinations based solely on the paper record are not accorded a presumption of correctness, *i.e.*, AEDPA deference) (citing *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497 (1987)); *see also Mann v. Scott*, 41 F.3d 968, 982 (5th Cir. 1994).

For demeanor-based challenges especially, appellate review is necessarily dependent on the trial court's inquiry into the prosecutor's reasons and his personal observations of the juror's demeanor that is the basis for those reasons. *See Snyder*, 128 S.Ct. at 1208; *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988); *Bentley-Smith*, 2 F.3d at 1375; *United States v. Cobb*, 975 F.2d 152, 155-56 (5th Cir. 1992). Such an inquiry is derivative of the trial court's clearly established obligation to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (citation omitted and emphasis added)); *id.* at 95 ("[T]he trial court *must* undertake a '*factual inquiry*' that 'takes into account *all possible explanatory factors* 'in the particular case." (emphasis added)); *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005) ("*Miller-El II*") ("As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it *requires* the judge to assess the plausibility of that reason *in light of all evidence* with a bearing on it." (emphasis added)). For example, in *Jones v. Butler*, we read

Batson to require the application of the trial court's observations of individual jurors if relevant to the prosecutor's explanation:

> The trial judge then evaluates, 'consider[ing] all relevant circumstances,' whether the prosecutor's explanation is race-neutral or a pretext for excluding potential jurors based on race. In making this determination the trial judge has available not only the prosecutor's explanation, but also the judge's observations of the demeanor of the prosecutor *and the veniremen*. As the Supreme Court noted in *Batson*, the finding of intentional discrimination in use of peremptory challenges is a finding of fact that 'largely will turn on evaluation of credibility.' Years after trial, the prosecutor cannot adequately reconstruct his reasons for striking a venireman. Nor can the judge recall whether he believed a potential juror's statement that any alleged biases would not prevent him from being a fair and impartial juror.

864 F.2d 348, 369-70 (5th Cir. 1988) (emphasis added); *see also Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir. 1992) (quoting *Mayo v. Lynaugh*, 893 F.2d 683, 689 (5th Cir.), *modified*, 920 F.2d 251 (5th Cir. 1990)). Texas courts have also read *Batson* in this way:

> *Batson* requires the trial judge to embrace a participatory role in *voir dire*,

> noting the subtle nuance of both verbal and nonverbal communication from each member of the venire. . . . The trial judge is present during *voir dire* and is best able to observe the demeanor and tenor of voice of the venireperson. . . . Accordingly, although a prosecutor gives a race-neutral explanation, the trial judge, based upon all the evidence and his observations and experience, may determine whether or not the explanation is artificial or pretextual.

Smith v. State, 814 S.W.2d 858, 861-62 (Tex. Ct. App.–Amarillo 1991); *accord Ingram v. State*, 978 S.W.2d 627, 630 (Tex. Ct. App.–Amarillo 1998); *Gaines v. State*, 811 S.W.2d 245, 250 (Tex. Ct. App.–Dallas 1991). Taking these principles together, trial courts are accorded the primary role in adjudicating *Batson* challenges because they can apply the relevant circumstances, which include their presumed observations of the juror and the entire *venire* as part of their role to oversee the trial. *See, e.g., Rice v. Collins*, 546 U.S. 333, 336 (2006); *Miller-El II*, 545 U.S. at 240; *United States v. Armstrong*, 517 U.S. 456, 467-68 (1996). In this case, the trial court and the state appellate court did not conduct a "factual inquiry" or a "sensitive" inquiry into the demeanor-based reasons because neither court applied the relevant observations of the juror's demeanor despite the trial court's role and experience overseeing the individual *voir dire*. The state appellate court in this case found that both the trial judge and the appellate court made their *Batson* determinations from the same appellate fact-

finding position, i.e., from the cold paper record, and, therefore the state court concedes there was no trial fact-finding. The state appellate court concluded:

> Because the trial judge did not witness the actual *voir dire* at issue, his position as fact-finder with regard to the demeanor of the veniremembers at issue *is no better than that of this Court.* Thus, we owe him no deference. . . . But regardless of whether the trial judge referred to the record, any concern arising from this situation is moot, because we have not given deference and have ourselves reviewed the *voir dire* record.

Haynes, No. 73,685, slip op. at 17-18 (emphasis added) (citing *Garcia v. State*, 15 S.W.3d 533, 535-36 (Tex. Ct. Crim. App. 2000)). Taking this conclusion to its logical end, we cannot correspondingly apply AEDPA deference to the state court, because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor. *See Moody*, 476 F.3d at 272. It is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants. *See, e.g., Witt*, 469 U.S. at 428; *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984); *Ciccarello v. Graham*, 296 F.2d 858, 860 (5th Cir. 1961) ("Analysis of the cold record can never equal a first-hand observation of the witness' demeanor on the stand[.]"). Therefore, no court, including ours, can now engage in a proper adjudication of the defendant's demeanor-based *Batson* challenge as to prospective juror Owens because we will be relying solely on a

paper record and would thereby contravene *Batson* and its clearly-established "factual inquiry" requirement.[2] *See, e.g.*, *Snyder*, 128 S.Ct. at 1207; *Batson*, 476 U.S. at 95.

For these reasons, we now order the district court to grant conditional habeas relief. We REVERSE the district court's judgment denying habeas relief and REMAND this case to that court with instructions to order the State of Texas to either give Anthony Cardell Haynes a new trial or release him from custody within 180 days of the date of the district court's order on remand.

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2. Because we find a *Batson* violation as to prospective juror Owens, we need not analyze the alleged violation as to prospective juror McQueen. *See Snyder*, 128 S.Ct. at 1208.

United States Court of Appeals
Fifth Circuit
FILED
April 23, 2008

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-70004

ANTHONY CARDELL HAYNES

Petitioner-Appellant

v.

Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CV-3424

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

DENNIS, Circuit Judge:

This case involves an application for a certificate of appealability ("COA") filed by Petitioner Anthony Cardell Haynes ("Petitioner") to appeal the district court's denial of habeas corpus relief under 28 U.S.C. § 2254. Petitioner challenges the district court's denial of COA by asserting: (1) the district court erred in denying his COA *sua sponte* and preemptively; (2) the district court erred in finding Petitioner's ineffective assistance of counsel claims to be procedurally barred; (3) the district court abused its discretion in denying his motion to stay and abate proceedings so as to allow him the opportunity to exhaust his unexhausted claims in state court; (4) the State's prosecution deliberately and purposefully used peremptory challenges to exclude African-Americans from the jury thereby violating his right to a jury process free from racial discrimination; and (5) Haynes's due process rights were violated because the state trial court was unconstitutionally biased against him. We find no reason to dispute the district court's assessment of Haynes's claims, except for Haynes's claim (4) with regards to two potential jurors. In light of the Supreme Court's recent decision in *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), we conclude that Haynes is entitled to a COA in connection with his *Batson* claims in respect to potential jurors Owens and McQueen. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

I. BACKGROUND

The district court set forth the relevant facts as follows:

> At around 10:30 p.m. on May 22, 1998, off-duty Houston Police Department Officer Kent Kincaid and his wife left their home in a private vehicle on their way to meet some friends at a sports bar. As they drove past a truck driven by Haynes, something hit and cracked the Kincaid[s'] windshield. Officer Kincaid thought someone threw a rock at his car; Haynes had actually fired a shot at them. Officer Kincaid turned his car around and followed Haynes' vehicle until the two pulled alongside each other.
>
> Officer Kincaid exited his vehicle, approached Haynes who remained sitting in his truck, and said "You hit my window." Haynes replied, "I accidentally threw something at your window." Officer Kincaid said, "I am a police officer. Let's talk about it." After asking for Haynes' license, [O]fficer Kincaid reached towards his back pocket, presumably to retrieve his police identification. Haynes lifted up a pistol, shot [O]fficer Kincaid in the head, and fled the scene. Officer Kincaid died a few hours later.
>
> The police soon arrested Haynes. Haynes confessed to [O]fficer Kincaid's

> murder. The State of Texas charged Haynes with the capital murder of a peace officer who was "acting in the lawful discharge of an official duty[.]" Tex. Penal Code § 19.03(a) (1). A jury convicted Haynes of capital murder. After a separate punishment hearing, the jury answered Texas's special issues in a manner requiring the imposition of a death sentence. Haynes unsuccessfully sought state appellate and habeas relief from his conviction and sentence.

Haynes v. Quarterman, No. 4:05-CV-3424,2007 WL 268374, at *1 (S.D. Tex. Jan. 25, 2007) (internal footnotes omitted). The district court appointed counsel to help Haynes through the federal habeas process. Haynes filed a habeas petition on October 5, 2005, with the District Court for the Southern District of Texas. The district court denied habeas relief in an opinion on January 25, 2007. At the end of the extensive memorandum opinion, the district court appended a relatively short sua sponte denial of COA essentially reciting the standard of review and then concluding:

> Under the appropriate standard the court finds that Haynes has not shown that this court should certify any issue for appellate consideration. This court **DENIES** Haynes a COA on all the claims raised by his petition.

Id. at *37 (emphasis in original). Haynes now seeks a COA from this court to challenge the district court's denial of habeas relief.

II. STANDARD OF REVIEW

A petitioner must obtain a COA before appealing the district court's denial of habeas relief. 28 U.S.C. 5 2253(c). "This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . .'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (*Miller-El I*) (quoting 28 U.S.C. § 2253(c)(1)). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)). According to the Supreme Court, this requirement includes a showing that "reasonable jurists could debate, whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). As the Supreme Court explained:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases

> adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El I, 537 U.S. at 336-37.

In sum, Petitioner need not show that his habeas petition will ultimately prevail on the merits in order for this court to issue a COA. *Id.* at 337. In fact, the Supreme Court has specifically instructed that a court of appeals should not deny a COA simply because the petitioner has not demonstrated an entitlement to relief. *Id.* Instead, "'where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Id.* at 338 (quoting *Slack*, 529 U.S. at 484). "Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *ShisInday v. Quarterman*, 511 F.3d 514, 520 (5th Cir. 2007) (citing *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997)).

For claims that were adjudicated on the merits in state court, "[o]ur role is to determine not whether [petitioner] is entitled to relief, but whether the district court's conclusion that the state court adjudication was

not contrary to or an unreasonable application of clearly established federal law is one about which jurists of reason could disagree or as to which jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Jackson v. Dretke*, 450 F.3d 614, 616 (5th Cir. 2006).

III. ANALYSIS

A. *Remand is Unwarranted To Correct Any Alleged Error in the District Court's Denial of COA*

Haynes presents two independent arguments alleging error in the district court's *sua sponte* denial of COA. First, he contends the district court cannot *sua sponte* deny a COA, and second, he contends the district court did not provide a sufficient statement of reasons for its denial of COA.

The first argument is without merit. We have clearly held that the district court's denial of COA *sua sponte* is "perfectly lawful." *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

In *Alexander*, we also suggested that a district court's *sua sponte* denial of COA was proper, in part, because "[the petitioner] points to no legal support for his contention that his rights were violated by the district court's *sua sponte* denial of COA without prior briefing and argument by counsel." *Id.* In his second argument, Haynes specifically contends that the district court's *sua sponte* denial violates the Federal Rules of Appellate Procedure Rule 22(b)(1) because it does not supply adequate individualized reasons for its denial. Haynes contends that because of this violation, the district court's *sua sponte* denial is improper. Rule

22(b)(l) states, "[i]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability *or state why* a certificate should not issue." (emphasis added). We have not explicitly ruled on what is required under Rule 22(b)(l), but other Circuit courts have rejected *pro forma* blanket denials. In *Herrera v. Payne*, 673 F.2d 307, 307 (10th Cir. 1982), the Tenth Circuit vacated a blanket denial of a COA even though the denial referred to the extensive analysis in the court's decision to deny habeas relief. *See also Brown v. Booker*, 622 F. Supp. 993, 994 & n.2 (E.D. Va. 1985). In accordance with the Tenth Circuit, the Sixth Circuit has more recently held in *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001), that even after setting forth reasons denying habeas relief, the district court must also give individualized consideration to each claim under *Slack*, 529 U.S. at 483, in its denial of COA.

Even assuming *arguendo* that we should follow these persuasive authorities, and find that the district court violated Rule 22(b)(l) by not stating individualized reasons in its denial of COA,[1] Rule 22 does not necessarily require us to remedy a violation by vacating the district court's defective issuance or denial of COA and remanding the case back to the district

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1. Some district courts in the Sixth Circuit consider short statements denying COA (which are substantively similar to the statement denying COA in this case) that are attached to a comprehensive memorandum justifying the denial of habeas relief as in full compliance with *Murphy* and Rule 22(b)(l). *E.g.*, *Robinson v. Hofbauer*, No. 2:07-CV-134, 2008 WL 324217, at *2-3 (W.D. Mich. Feb. 5, 2008).

court. See 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3968. 1 n.8 (2d ed. 2007) ("Appellate Rule 22(b) does not provide any clear answer to the consequences of a district court's failure to provide an adequate statement of the reasons for denying a certificate of probable cause."). Other Circuit courts have indicated that an appellate court may choose to excuse a procedural violation with regards to an allegedly defective COA determination rather than remand the case and, thereby, delay appeals. *See Davis v. Borgen*, 349 F.3d 1027, 1028 (7th Cir. 2003) ("Only when the motion to vacate is made early enough to produce savings for the litigants - and even then only when issuance of the certificate was an obvious blunder, so that the court of appeals need not traverse the same ground twice . . . does it make sense to entertain a motion to vacate a certificate."); *Frazier v. Huffman*, 343 F.3d 780, 788-89 (6th Cir. 2003). In this case, the district court's memorandum opinion comprehensively explains the district court's rationale for denying habeas relief, and the memorandum opinion supporting the denial of habeas relief provides the reasons for the district court's denial of COA. Moreover, the parties have fully briefed the important issues on appeal. Accordingly, circumstances do not warrant vacating the district court's decision denying a COA, so we decline to do so. *See Frazier*, 343 F.3d at 788-89. Such a remedy would only delay the judicial process and frustrate the legislative purpose, i.e., facilitating appellate review, underlying the COA mechanism. *See Davis*, 349 F.3d at 1028.

B. District Court Did Not Err in Applying the Exhaustion Doctrine

"[F]ederal habeas petition[s] should be dismissed if state remedies have not been exhausted as to all of the federal court claims. . . . The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Smith v. Dretke*, 422 F.3d 269, 275 (5th Cir. 2005) (internal citations omitted). Haynes presents no reason why the district court was incorrect in its conclusion that virtually all of his ineffective assistance of counsel claims were unexhausted. Thus, Haynes does not dispute the district court's conclusion that these claims are procedurally defaulted. Instead, he contends that three exceptions to exhaustion apply: (1) the successive state habeas application will be the first practicable opportunity to raise the ineffective assistance of counsel claims; (2) there is "cause and prejudice"; and (3) exemption from procedural default averts a "fundamental miscarriage of justice."

First, Haynes argues that because the state-appointed counsel in his first post-conviction proceeding was inadequate, he could not raise his claims in prior petitions. However, we have consistently noted that "alleged infirmities in state habeas proceedings are not grounds for federal habeas relief." *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005). In fact, in *Elizalde v. Dretke*, we rejected arguments identical to the arguments Haynes now raises. 362 F.3d 323, 329-31 (5th Cir. 2004) ("First, neither the Supreme Court, nor this court, has ever recognized that a state created obligation to provide

effective assistance of counsel would make the State rather than the petitioner responsible for a procedural default, as might be the case if a federal constitutional right existed.").

Second, Haynes also asserts that the alleged ineffectiveness of state habeas counsel supports the "cause" prong of the "cause and prejudice" exception to procedural default, but again *Elizalde* and earlier precedent clearly foreclose this argument. 362 F.3d at 331; *see also In re Goff*, 250 F.3d 273, 276 (5th Cir. 2001) ("[T]he Supreme Court has spoken quite explicitly . . . and has repeatedly emphasized that ineffective assistance of counsel in a post-conviction proceeding cannot serve as cause to excuse default in a federal habeas proceeding.").

Third, Haynes argues that his trial counsel's alleged failure to present significant mitigation evidence for the jury's determination of Texas's special issues is evidence of "actual innocence." A claim of "actual innocence" can excuse the exhaustion requirement so as to avert a "fundamental miscarriage of justice." *Wilkerson v. Cain*, 233 F.3d 886, 889 (5th Cir. 2000) (quoting *Schulp v. Delo*, 513 U.S. 298, 321 (1995)). However, in *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992), the Supreme Court stated: "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." The evidence that was allegedly not presented during Haynes's sentencing deals exclusively with mitigating evidence and this

evidence does not show that Haynes was actually innocent of a death-eligible offense.[2] Accordingly, Haynes presents no valid argument that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong so as to overcome the procedural bar.[3]

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2. Haynes asserts in his reply-brief that the police officer-victim was "off-duty" at the time of shooting and therefore Haynes is not guilty of capital murder. It is clear that evidence, considered in a light most favorable to the verdict, supports the capital murder conviction because murder of off-duty policemen in the "lawful discharge of [their] duties" is death penalty-eligible. *Moore v. State*, 999 S.W.2d 385, 404 (Tex. Crim. App. 1999). As in Moore, evidence here shows the defendant was aware that the victim was a police officer before murdering him. Haynes does not present any new evidence in his motion for COA supporting this claim of "actual innocence"; he does not even present any new evidence that persuasively refutes evidence supporting the conviction.

3. Haynes's argument that he must be accorded an evidentiary hearing to assess his "cause and prejudice" claim is without merit. As the Eleventh Circuit held in the case he cites, *Williams v. Turpin*, 87 F.3d 1204, 1211 (11th Cir. 1996), "[petitioner] is entitled to an evidentiary hearing for purposes of establishing cause and prejudice *if* he has proffered specific facts sufficient to support such a finding." (emphasis added). Similarly, we have stated, "[petitioner's] conclusory allegations are insufficient to require either discovery or an evidentiary hearing, and the district court did not abuse its discretion in denying [petitioner's] request for the same." *Murphy v. Johnson*, 205 F.3d 809, 817 (5th Cir. 2000). Here, Haynes' facts and allegations are clearly insufficient as a matter of law to require more discovery.

C. *District Court Did Not Abuse Its Discretion In Denying Stay and Abeyance*

Haynes argues that the district court abused its discretion in denying a stay and abeyance that would have allowed him an opportunity to exhaust his unexhausted state claims.

According to the Supreme Court, "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition." *Rhines v. Weber*, 544 U.S. 269, 278 (2005). The Supreme Court in Rhines also stated that "stay and abeyance should be available only in limited circumstances." *Id.* at 277.

Even assuming arguendo there is "good cause," Haynes' unexhausted claims have no potential merit. *Id.* at 278 (noting that a district court would abuse its discretion in denying a stay for unexhausted claims that are "potentially meritorious."). Haynes predicts the Texas courts would grant him the opportunity to pursue a successive habeas petition despite failing to assert his claims in a previous petition. He contends that the Texas courts would not deny his successive habeas petition as an "abuse of the writ," because the Texas Code of Criminal Procedure article 11.071 section 5(a)(3) permits successive applications for post-conviction relief if the petition presents "sufficient specific facts" that establish "by clear and convincing

evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial." Haynes argues that this provision applies to his claims, because additional mitigating evidence for the special issues was not presented due to alleged ineffectiveness of counsel.

Under the Texas case-law, his argument is without merit. In interpreting this provision, the Texas Court of Criminal Appeals denied permission for filing a successive state application because "[a]t best, applicant's claim would establish that the jury might have answered a special issue differently, not that it would have done so." *Ex parte Hood*, 21 1 S.W.3d 767, 774 (Tex. Crim. App. 2007). Consistent with this holding, the Texas Court of Criminal Appeals has also construed section 5(a)(3) as analogous to the federal "actual innocence" exception to exhaustion. The court in *Ex parte Blue*, 230 S.W.3d 151, 160-61 (Tex. Crim. App. 2007) has stated:

> [The Supreme Court in *Sawyer v. Whitley*] has expressly rejected the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon a defendant who is unquestionably *eligible* for it under state law can be considered sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings. Section 5(a)(3) of Article 11.071 represents the

> Legislature's attempt to codify something very much like this federal doctrine of "actual innocence of the death penalty" for purposes of subsequent state writs. By tying the exception to the general prohibition on subsequent state writs specifically to the statutory special issues in Article 37.071 of the Code of Criminal Procedure, the Legislature apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*. This reading of the exception seems to limit its applicability to constitutional errors that affect the applicant's *eligibility* for the death penalty *under state statutory law*.

Here, Haynes alleges that mitigating evidence could have influenced the jury's discretion but does not argue that evidence not presented due to alleged ineffective assistance of counsel would render him *ineligible* for the death penalty. Therefore, he has no meritorious argument that the Texas Court of Criminal Appeals would allow him to file a successive application for post-conviction relief even if the district judge granted a stay and abeyance. Accordingly, the district court did not abuse its discretion.

D. Reasonable jurists would find the District Court's assessment of the Batson *claims debatable*

Haynes requests this court to grant a COA for his claim that the state prosecution based its use of peremptory challenges in jury selection on impermissible racial characteristics in violation of

equal protection as articulated in *Batson*, 476 U.S. at 95-98. Three steps are involved in a *Batson* challenge:

> The Supreme Court has outlined a three-step process for determining whether peremptory strikes have been applied in a discriminatory manner. First, the claimant must make a *prima facie* showing that the peremptory challenges have been exercised on the basis of race. Second, if this requisite showing has been made, the burden shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges. Finally, the trial court must determine whether the claimant has carried his burden of proving purposeful discrimination.

United States v. Bentley-Smith, 2 F.3d 1368, 1373 (5th Cir. 1993). The State does not dispute that, in respect to four prospective jurors, the defendant made a *prima facie* showing that the peremptory challenges had been exercised on the basis of race. However, the State contends that after succeeding in the first *Batson* step, the defendant's claim falters. Accordingly, our analysis proceeds directly to *Batson*'s second and third steps regarding those four prospective jurors.

At the outset, however, it should be noted, that two different state trial judges took turns in presiding over the jury selection process in this case. Judge Wallace presided at the beginning of the jury selection process when the jurors were addressed and questioned as a group; Judge Harper presided during the next

stage in which the attorneys questioned the prospective jurors individually; and Judge Wallace presided again during the final stage in which peremptory challenges were exercised and when *Batson* challenges were made, considered and ruled upon. Thus, Judge Wallace, who ruled upon the *Batson* challenges was not presiding when the prosecutor determined the demeanor of the prospective jurors in responding to individual questioning.[4]

Haynes is African-American. Of the fifty people in the venire, six of the seven African-Americans appeared for *voir dire*. Of those six, the prosecution struck four, and the defense struck one. One African-American juror was seated on the jury. The four African-Americans peremptorily challenged by the prosecution were: Twanna Kirkling, Melba Goodman, L.V. McQueen, and Betty Owens. For each strike, the prosecution offered an explanation.

For Twanna Kirlking, the prosecution stated that "during her interview, she said capital punishment was a last resort, meaning several times she hesitated in responding to the questions about the

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4. Although Judge Wallace also presided when the jurors were addressed and questioned as a group at the beginning of the jury selection process, the record reflects that only Judge Hughes presided during the proceedings at which the attorneys examined and determined the demeanor of the prospective jurors individually. Moreover, the prosecutor's peremptory challenge explanations refer to the prospective jurors' demeanor and answers during individual questioning and not their demeanor and answers during group questioning.

death penalty." The prosecution also added that she "looked at capital punishment. . . as a necessary evil" and "avoided giving any direct position on capital punishment that it was a viable object for the State and, furthermore, she stated that life, 40 [years], is a justifiable punishment." The defense counsel objected noting that other jurors also articulated the "necessary evil" view.

For Melba Goodman, the prosecutor said that from his "impression of the interview," he thought "[s]he opposed death punishment [and] [s]he refused to answer questions about capital punishment." The prosecution added, "[s]he reluctantly agree[d] that capital punishment for [the murder of] police officers should be available [and] [s]he also demonstrated through her demeanor that she was very anti-capital punishment." The defense did not dispute this explanation at that time.

For L.V. McQueen, the prosecution said, "when questioned, M[r]. McQueen would give me all the indications that in responses to my questions by the language of demeanor that he was very weak on the death punishment. . . and stated that there were some cases that I could not give a death sentence even if the law permitted such." The defense counsel indicated that in McQueen's jury questionnaire, he had showed support for the death penalty.

For Betty Owens, the prosecution stated that "this lady's demeanor was . . . somewhat humorous [and] [s]he never did really take on a serious attitude during the interview." The prosecution added, "[s]he would say one thing but her body language would

indicate that this is not her true feeling." The prosecutor also indicated that he thought because the defendant's trial counsel spent little time with her, the trial counsel was pleased with her and, therefore, she would "certainly be leaning toward a life sentence." Defense counsel objected noting that Owens's jury questionnaire suggested that she would favor the prosecution and her answers indicated impartiality.

Regarding the second step of the *Batson* analysis, Judge Wallace accepted each of these explanations as "race-neutral" without any specific findings. Because Judge Wallace was not present when the prospective jurors were individually questioned at *voir dire*, it arguably follows that he was not able to credit the prosecutor's assertions that his peremptory challenges were based on the jurors' demeanor during individual *voir dire* rather than their race. In an analogous context in *Snyder v. Lousiana*, 128 S. Ct. 1203, 1207-09 (2008), the Supreme Court rejected the State's argument that the prosecutor's peremptory challenge was validly based on a prospective juror's nervousness for the reason that the record did not reflect whether the trial court, in allowing the challenge, had noted, recalled or made a determination as to the juror's demeanor. Because the trial court in *Snyder* simply accepted the explanation as race-neutral and allowed the challenge without stating any reason, the Supreme Court discounted the possibility that the trial court could have based its "race-neutral" determination on the prosecution's "demeanor" explanation even under a highly deferential "clear error" standard. *Id.* The Supreme Court explained:

With respect to the [demeanor] reason, the Louisiana Supreme Court was correct that "nervousness cannot be shown from a cold transcript, which is why . . . the [trial] judge's evaluation must be given much deference." 942 So. 2d, at 496. . . . [D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning [prospective juror] Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial

> judge credited the prosecutor's assertion that Mr. Brooks was nervous.

Id. at 1209. Under *Snyder*'s application of *Batson*, therefore, an appellate court applying *Batson* arguably should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge.

Consequently, we conclude that the district court arguably erred in finding that the state courts properly relied upon the prosecution's "demeanor" explanations for its peremptory challenges of jurors McQueen and Owens. Acknowledging the lack of support in the written record for finding that McQueen was biased against the prosecution or the death penalty, the district court found that the "prosecution's justification for striking [McQueen] . . . focused on his demeanor. . . . suggesting that the record possibly belies his feelings as manifested through his in-court deportment." *Haynes*, 2007 WL 268374, at *16 n.9. Further, in respect to Owens, the district court deferred to the Texas Court of Criminal Appeals' reliance on the prosecutor's allusion to Owens's demeanor as the sole justification for finding that the prosecution's peremptory challenge of her was "race neutral." *Haynes*, 2007 WL 268374, at 16; see also *Haynes v. Texas*, No. 73,685, slip. op. at 16 (Tex. Crim. App. Oct. 10, 2001) (relying solely on demeanor in determining if the trial judge's acceptance of the State's explanation as "race-neutral" for striking Owens was not clearly erroneous).

However, Judge Wallace, the state trial judge who upheld the peremptory challenges of McQueen and Owens, could not have possibly credited the prosecutor's assertion that they were struck because of their demeanor during individual questioning; Judge Wallace did not preside during the individual examination of the jurors. *Snyder*, 128 S. Ct at 1209. Further, the district court did not find another credible non-racial explanation that could justify the state courts' determination that the peremptory challenge of Owens and McQueen was "race-neutral." Thus, arguably, the State has failed to satisfy *Batson*'s second step. Accordingly, in light of the Supreme Court's decision in *Snyder*, which applied its understanding of *Batson* to a similar factual issue, reasonable jurists may debate whether the district court could have resolved Haynes's *Batson* claims in respect to Owens and McQueen differently. See *Abu-Jamal v. Horn*, Nos. 01-9014, 02-9001, 2008 WL 793877, at *8 (3d Cir. Mar. 27, 2008) (using *Snyder* as guidance for how to apply *Batson* in state habeas case). Furthermore, as this is a capital case, doubts about granting a COA should be strongly resolved in favor of the petitioner. *ShisInday*, 511 F.3d at 520 ("Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination.").

The district court and the state courts' analyses of the prosecutor's explanations for challenging the other two potential African-American jurors (Goodman and Kirkling) did not rely on "demeanor." Instead, the State's explanations focused on their reluctance to impose the death penalty in their on-the-record

answers to individual questioning at *voir dire*. Unlike the "demeanor" explanation, these explanations can be verified by the written record.

In respect to Goodman, we do not find the district court's determination to be debatable. In *United States v. Arce*, 997 F.2d 1123,1126-27 (5th Cir. 1993), we noted that a district court can accept the prosecution's race-neutral explanation if the explanation is facially valid and the defendant did not object below. "By failing to dispute the Government's explanations, [defendants] appeared to acquiesce in them. As a result, there was no need for the district judge to make a ruling." *Id.* at 1127 (quoting *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990)). Likewise, since the defendant similarly acquiesced in the present case, the district court could properly accept the state trial court's acceptance of the prosecutor's explanation as race-neutral. Moreover, the record supports the determination that the explanation was race-neutral. Goodman did waffle on whether she considered the murder of a pol ice officer to be a capital offense. Furthermore, the district court's decision in respect to Goodman is supported by the same reasons we assign and explain more fully regarding Kirkling below.

Prospective juror Kirkling stated during *voir dire* that she thought "to sentence someone to death is a last resort" and that the sentence of death would be applied if there is "not a possibility of redemption, of improvement on that person." She also admitted to "hesitation" in imposing the death penalty. As the prosecution presents a valid and acceptable

race-neutral explanation, *i.e.*, answers evincing a reluctance to impose the death penalty, "the question presented at the third stage of the *Batson* inquiry is 'whether the defendant has shown purposeful discrimination.'" *Snyder*, 128 S. Ct. at 1212 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (*Miller-El II*)). As evidence of discrimination, Haynes alleges the disparate treatment of jurors of different races. He contends the non-African American jurors were primarily asked only "yes and no" narrative questions while the four African-American jurors were asked more probing questions. The alleged disparate questioning is not reflected in the record.[5] Even assuming *arguendo* the prosecutors' questioning was inconsistent,

> [petitioner] did not show that the State's individualized reasons for peremptorily striking each African-American venireperson at issue were actually a pretext for racial discrimination or that any alleged disparate questioning did not result from reasons other than race.

Murphy v. Dretke, 416 F.3d 427, 438 (5th Cir. 2005). Difference in treatment between jurors of different races may be one factor but is not dispositive of pretext

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5. For example, the prosecution similarly probed non-challenged jurors about their attitudes toward the death penalty and the case in general, including Betty Pickens Hayter, Gwendolyna Freeman, Josh Flynn, etc. There is no evidence that shows narrative questions resulting in "yes and no" answers were used exclusively with non-African-American jurors.

and racial discrimination. *See United States v. Webster*, 162 F.3d 308, 350 (5th Cir. 1998) (noting that "[the jurors] had different combinations of qualities, and some had more government-desired qualities than did the jurors the government preempted."). The record evinces Kirkling's acknowledged hesitation with regards to using the death penalty. This is not a case in which "[t]he State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did." *Miller-El II*, 545 U.S. at 260. Based on the review of Haynes' allegations as to Kirkling, without any direct evidence of discrimination inherent in the explanation, there is no debate that we must take the explanation as to Kirkling as race-neutral without purposeful discrimination:

> Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. Petitioner does not point to anything said by the prosecutor in the prosecutor's justification of the challenged strikes that even hints at an inherent discriminatory intent.

Medellin v. Dretke, 371 F.3d 270, 279 (5th Cir. 2004) (internal quotations and citations omitted). Unlike *Miller-El I*, 537 U.S. at 345-46, Haynes does not assert any persuasive evidence to suspect the explanation as to Kirkling is a pretext for racial discrimination, such as procedural irregularities, *e.g.*, jury shuffling, a history of discrimination, or any similar evidence. Moreover,

> all that a prosecutor need offer is a facially valid explanation. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. . . . Accordingly, a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection. In the instant case, the prosecutor articulated specific conduct on the part of the potential jurors which the district court found legitimate. We do not intend to disturb such a finding.

United States v. Kelley, 140 F.3d 596, 606-07 (5th Cir. 1998). No reasonable jurists would debate the district court's findings as to Kirkling and Goodman.

However, as noted earlier, in light of *Snyder*, reasonable jurists may debate whether the district court's conclusions as to McQueen and Owens are correct and whether the state courts' applications of *Batson* as to those two jurors were unreasonable. "'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder*, 128 S. Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

E. No reasonable jurists would find the District Court's assessment of the allegations of unconstitutional judicial bias debatable or wrong

Finally, Haynes also requests this court to grant a COA for his claim that the state court trial judge was

unconstitutionally biased against his trial counsel. At one point in the trial, Haynes's trial counsel remained standing and continued to request a ruling even after the trial judge had asked him to sit down, and the trial judge then said: "You have one second to sit down or I'll remove you from the courtroom. Do we understand each other?" Haynes now alleges this act so intimidated his trial counsel that he failed to pursue any further objections for the balance of the trial.

At the end of the trial, his trial counsel filed a motion for a new trial based, in part, on the claim that he was barred from rendering effective assistance of counsel. The trial court held a hearing on that claim. At the hearing, the trial court judge noted that he never told the trial counsel to remain silent throughout the whole trial, but only told the trial counsel to sit down at that particular moment. The Texas Court of Criminal Appeals also did not find any improper bias.

We agree. As the Supreme Court has stated, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The Court continued:

> Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration - even

> a stern and short-tempered judge's ordinary efforts at courtroom administration - remain immune.

Id. at 555-56. We have refused to find reversible bias in more serious situations. *See, e.g., Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 580-81 (5th Cir. 2005) (refusing to find bias even when the judge labeled the pending lawsuit "a campaign of terror"). Accordingly, we conclude that no reasonable jurist would find the district court's assessment of the judicial bias claim debatable or wrong.

IV. CONCLUSION

For the foregoing reasons, the application for a COA is denied as to all issues except for Haynes's *Batson* claims with regards to jurors Owens and McQueen. Accordingly, a COA is GRANTED as to (1) whether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror Owens; and (2) whether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror McQueen.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONY CARDELL HAYNES, Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. H-05-3424
NATHANIEL QUARTERMAN, Respondent.	§	

MEMORANDUM OPINION AND ORDER

Anthony Cardell Haynes ("Haynes"), a Texas death row inmate, filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket Entry No. 1) This action comes before the court on respondent Nathaniel Quarterman's answer and motion for summary judgment. (Docket Entry No. 10) After reviewing the pleadings, the record, and the applicable law - particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") - the court will deny Haynes' petition and will dismiss this action. The court will not certify any issue for appellate review.

I. Background

At around 10:30 p.m. on May 22, 1998, off-duty Houston Police Department Officer Kent Kincaid and his wife left their home in a private vehicle on their

way to meet some friends at a sports bar. As they drove past a truck driven by Haynes, something hit and cracked the Kincaid's windshield. Officer Kincaid thought someone threw a rock at his car; Haynes had actually fired a shot at them. Officer Kincaid turned his car around and followed Haynes' vehicle until the two pulled alongside each other.

Officer Kincaid exited his vehicle, approached Haynes who remained sitting in his truck, and said "You hit my window." Haynes replied, "I accidentally threw something at your window." Officer Kincaid said, "I am a police officer. Let' s talk about it." After asking for Haynes' license, officer Kincaid reached towards his back pocket, presumably to retrieve his police identification. Haynes lifted up a pistol, shot officer Kincaid in the head, and fled the scene. Officer Kincaid died a few hours later.

The police soon arrested Haynes. Haynes confessed to officer Kincaid's murder. The State of Texas charged Haynes with the capital murder of a peace officer who was "acting in the lawful discharge of an official duty [.]" TEX. PENAL CODE § 19.03 (a)(1). A jury convicted Haynes of capital murder.[1] After a separate punishment hearing, the jury answered Texas's special issues in a manner requiring the imposition of a death sentence.[2] Haynes unsuccessfully

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1. Two attorneys, Allen Nunnery and Robert Alton Jones, represented Haynes at trial. For the most part, this court will refer to them conjunctively as "trial counsel."

2. Texas law requires the jury to answer two special issue questions in the penalty phase that determine whether (continued...)

sought state appellate and habeas relief from his conviction and sentence.

This court appointed counsel to represent Haynes throughout federal habeas review. Haynes filed a lengthy petition raising the following grounds for relief:

1. Trial counsel provided ineffective assistance by failing to

   (a) prepare adequately for and present mitigating testimony in the punishment phase of trial;

   (b) present a coherent mitigation defense;

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2. (...continued)
a defendant receives a death sentence. Here, the trial court instructed the jury as follows :

Special Issue No. 1

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Anthony Cardell Haynes, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 2

> Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Anthony Cardell Haynes, that there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed?

Trans. At 458-59.

(c) adduce testimony relating to Haynes' immaturity;

(d) present evidence of Haynes' psychological disorders;

(e) present accurate information concerning Haynes' intellectual ability and school performance;

(f) present evidence of Haynes' generational family dysfunction;

(g) present evidence of problems in the life of Haynes' parents;

(h) present evidence of Haynes' adolescent psychological disturbances;

(i) present evidence of Haynes' drug abuse and drug intoxication when he murdered the victim;

(j) argue satisfactorily that Haynes would not be a future danger;

(k) respond adequately to the prosecution's future-dangerousness argument;

(l) present evidence of Haynes' good conduct while incarcerated;

(m) adduce testimony concerning the low risk of violence that capital inmates present while in prison;

(n) show the low probability that Haynes himself would act violently in prison;

(o) review Haynes' mental health records;

(p) object to the intimidating trial atmosphere;

(q) present good character evidence;

(r) present evidence of remorse;

(s) counter evidence of Haynes' violent threats to others ;

(t) object to speculative testimony;

(u) allow Haynes to testify in his own behalf;

(w) object to hearsay statements;

(x) request an instruction limiting the jury's consideration of the State's victim impact evidence; and

(y) provide comprehensively adequate representation.

2. The prosecution used its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986).

3. Haynes is actually innocent of capital murder because the victim was not acting in the official course of his duties immediately before the murder.

4. Trial counsel provided ineffective assistance by not fashioning Haynes' drug use around the time of the murder into a defense.

5 The trial court violated his constitutional rights by having a judge who did not oversee the jury selection hear his Batson arguments.

6. The prosecution engaged in constitutionally significant misconduct.

7. The trial court violated his Fourth and Fourteenth Amendment rights by not suppressing his audiotaped statements.

8. The admission of Haynes' audiotaped statements violated his Fifth and Fourteenth Amendment rights.

9. The trial court erred in overruling Haynes' attempts to strike several potential jurors.

10. Haynes' attorney on state habeas review violated his rights to due process and meaningful access to the courts.

11. Texas's "12-10 Rule" violates the Eighth and Fourteenth Amendments.

12. Texas's lethal injection procedure violates the Eighth Amendment.

13. Texas's mitigation special issue violates the Constitution by failing to assign a burden of proof to the prosecution.

14. The jury instructions failed to inform the jury of the consequences of not answering one of Texas's special issues.

15. Insufficient evidence supported the jury's finding on the future dangerousness special issue.

16. The trial court erred in denying Haynes' motion for a new trial.

17. The admission of victim impact testimony violated the Eighth Amendment.

18. Haynes' alleged lack of volitional capacity at the time of the murder exempts him from execution under Atkins v. Virginia, 536 U.S. 304 (2002).

19. Texas's use of the death penalty violates the Constitution's cruel and unusual punishment clause.

20. Haynes' death sentence violates the Eighth Amendment and international law.

21. The trial court violated Haynes' constitutional rights by showing bias in the prosecution's favor.

22. The prosecution suppressed favorable evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

23. The cumulative effect of the trial errors deprived Haynes of due process.

Respondent filed an answer to the habeas petition. (Docket Entry No. 10) Haynes filed a reply. (Docket Entry No. 15) Haynes also asks this court to hold his federal proceedings in abeyance while he exhausts

state court remedies. (Docket Entry No. 16) Haynes' petition is ripe for adjudication.

II. Standard of Review

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." Barefoot v. Estelle, 463 U.S. 880, 887 (1983); see also Moore v. Dempsey, 261 U. S. 86, 87-88 (1923) (" [W] hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."). "Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely." Barefoot, 463 U.S. at 887. Accordingly, federal habeas proceedings honor the "presumption of finality and legality [that] attaches to [a petitioner's] conviction and sentence." Id. at 887.

Federal courts give effect to the traditional limits on habeas relief through the AEDPA's deferential standard of review. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism[.]" Woodford v. Garceau, 538 U.S. 202, 206 (2003) (quotation and citation omitted). The AEDPA forbids habeas relief on issues adjudicated on the merits in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28

U.S. C. § 2254(d). The AEDPA also requires federal deference to state fact-findings unless a petitioner presents clear and convincing evidence in rebuttal. See 28 U.S.C. § 2254(e)(1).

Nevertheless, a petitioner's compliance with 28 U.S.C. § 2254(d) does not entitle him to habeas relief. No Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard [.]" Horn v. Banks, 536 U.S. 266, 272 (2002); see also Robertson v. Cain, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Other judicial doctrines, such as the harmless-error doctrine and the non-retroactivity principle, bridle federal habeas relief. See Thacker v. Dretke, 396 F.3d 607, 612 n.2 (5th Cir.), cert. denied, __ U. S. __, 126 S. Ct. 80 (2005). Thus, any trial error cannot require habeas relief unless it "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" Robertson, 324 F.3d at 304 (quoting Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)); see also Aleman v. Sternes, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). A habeas court likewise cannot grant relief if it would require the creation of new constitutional law. See Horn, 536 U.S. at 272 (relying on Teague v. Lane, 489 U.S. 288 (1989)) .

III. Exhaustion of State Court Remedies

The AEDPA requires a habeas petitioner to give the state courts the first opportunity to consider his federal constitutional claims. See 28 U.S.C. § 2254(b). The exhaustion requirement "is not jurisdictional, but reflects a policy of federal-state comity designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Anderson v. Johnson, 338 F.3d 382, 386 (5th Cir. 2003) (internal citations and quotations omitted); see also O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem [liness]' of a federal district court's overturning a state-court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.") (alteration in original) . Respondent argues that Haynes has failed to exhaust several of his claims, specifically all but two subparts of claim 1, most of claim 4, all of claims 6, 10, 12, 18 through 23, and possibly claim 17.

While respondent is correct that Haynes has failed to exhaust many claims, he errs with respect to the scope of those omissions. Haynes presented portions of his sixth, seventeenth, and twenty-first claims on state habeas review. Otherwise, respondent correctly notes that Haynes failed to exhaust most of claims 1 and 4, as well as all of claims 10, 12, 18-20, and 22-23.

This court must decide how to deal with those claims Haynes has not presented in state court. Haynes asks this court to hold his federal proceedings

in abeyance to allow state, and later federal, consideration of the issues. Respondent contends that state procedural law forecloses both state and federal consideration of Haynes' claims. This court finds that Haynes has not shown that federal or state review is available for his unexhausted claims.

A. Stay and Abeyance

Pointing to Rose v. Lundy, 455 U.S. 509 (1989), Haynes argues that this court must allow his return to state court for the exhaustion of remedies. Under Lundy, a mixed petition – that is, one raising both exhausted and unexhausted claims – is subject to a "total exhaustion" rule that requires the dismissal of any petition containing unexhausted claims. Id. at 522. Lundy, however, "contemplated that the prisoner could return to federal court after the requisite exhaustion." Slack v. McDaniel, 529 U.S. 473, 486 (2000). Aside from solidifying traditional judicial limits on habeas review (such as the exhaustion doctrine), the AEDPA enacted a stringent one-year limitations period that does not toll during the pendency of federal proceedings. See Duncan v. Walker, 533 U.S. 167, 173-74 (2001) . "As a result of the interplay between AEDPA's 1-year statute of limitations and Lundy's dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims." Rhines v. Weber, 544 U.S. 269, 275 (2005). A petitioner who files a timely petition containing unexhausted claims braves the risk of

Lundy dismissal after the limitations period runs, possibly closing all federal review.

Recognizing this procedural dilemma, Haynes does not ask for the dismissal of his petition without prejudice. Instead, he relies on the Supreme Court's recent adoption of a stay-and-abeyance safety valve for the consideration of unexhausted claims. In Rhines the Supreme Court authorized a limited stay-and-abeyance practice in federal court that allows for the development of meritorious claims while preserving the AEDPA's concern for finality and expediency. See id. at 278; see also Duncan, 533 U.S. at 182-83 (Stevens, J. concurring) (encouraging adoption of a stay-and-abeyance procedure). Rhines, however, hardly requires federal courts to stay every petition advancing unexhausted claims. Rhines only authorizes stay and abeyance when the petitioner shows: (1) good cause for failing to exhaust the claim; (2) that the claim is not plainly meritless; and (3) that he has not intentionally engaged in dilatory tactics. See Rhines, 544 U.S. at 277.

Haynes received one full round of state review. He made no effort there, either by primary review or in a successive post-conviction proceeding, to advance the numerous claims he raises for the first time in federal court. Several factors persuade the court that a stay is not appropriate. First, Rhines prohibits the abeyance of federal proceedings when "a petitioner engages in abusive litigation tactics or intentional delay[.] "Rhines, 544 U.S. at 278. A petitioner should request a stay early in the course of federal litigation, preferably by filing a "'protective' petition in federal

court" and then expeditiously moving for a stay. Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005). Haynes filed his federal habeas petition on October 5, 2005. (Docket Entry No. 1) Haynes waited over a year to file his motion to stay and abate. By the time this motion came before the court both parties had extensively briefed the legal and factual issues in this case. Delaying the federal action at this late date "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings" and "also undermines AEDPA's goal of streamlining federal habeas proceedings[.]" Rhines, 544 U.S. at 277. As an equitable mechanism to ameliorate the AEDPA's harsh provisions, abatement should only be available when a petitioner shows diligence and alacrity in asking for such an extraordinary procedure. Cf. In re Wilson, 442 F. 3d 872, 875 (5th Cir. 2006) ("'Equity is not intended for those who sleep on their rights.'") (quoting Fisher v. Johnson, 174 F.3d 710, 715 (5th Cir . 1999)). The languid manner in which Haynes requested a return to state court militates against granting a stay.

Second, Haynes does not show good cause for not raising his unexhausted claims until he filed his federal petition. Haynes' unexhausted claims rely on well-settled constitutional principles and easily discoverable factual predicates.[3] Nothing inherent in

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3. Haynes argues that he could not have advanced his claims until the Supreme Court issued recent decisions such as Wiggins v. Smith, 539 U.S. 510, 522-23 (2003), and Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003). Haynes ignores the fact that neither of those cases created new law, (continued...)

the structure of Texas's post-conviction review thwarted efforts to bring the unexhausted claims before the Texas Court of Criminal Appeals. Haynes easily could have raised these issues in his initial state proceedings or, identifying the claims after the appointment of federal counsel, filed a successive state application that would toll the limitations period. See Villegas v. Johnson, 184 F.3d 467, 473 (5th Cir. 1999) (finding that successive state proceedings toll the AEDPA's limitations period). Haynes could have filed a skeletal federal petition and then expeditiously sought protection under Rhines. See Pace, 544 U.S. at 416. Instead, Haynes blames his state habeas attorney for not advancing the claims earlier.

The Supreme Court has not yet established whether ineffective assistance of habeas counsel provides "good cause" in the stay-and-abeyance context. In other procedural areas, such as the cause-and-prejudice gateway for overcoming a procedural bar, the Fifth Circuit does not look favorably on blaming prior habeas counsel for failing to advance claims. See Ruiz v. Quarterman, 460 F.3d 638, 644 (5th Cir. 2006); Henderson v. Cockrell, 333 F.3d 592, 606 (5th Cir. 2003). Even if ineffective assistance of habeas counsel constitutes "good cause" under Rhines, Haynes has not shown that his state representation was deficient. The record before the court only shows that prior counsel did not raise certain claims – a circumstance that arises every time. a capital petitioner includes unexhausted claims in his federal

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3. (...continued)
but merely reexamined entrenched legal precedent.

petition. Haynes has not shown whether state habeas counsel's (or for that matter, state appellate counsel's) failure to raise those issues sprang from ineptitude, neglect, or strategic decision-making. Haynes has not made a record that would show that ineffective assistance of habeas counsel constitutes good cause in this case.

Third, the exhaustion doctrine, including the stay-and-abeyance safety valve, is predicated on the availability of state court remedies. See 28 U.S.C. § 2254(B)(1). Texas strictly enforces its abuse-of-the-writ doctrine (codified at TEX. CODE CRIM. PRO. art. 11.071 § 5(a)) and generally prohibits the filing of successive habeas applications. While article 11.071 allows the filing of a successive state habeas application in three limited circumstances, Haynes does not establish that he meets its demanding requirements. Article 11.071 § 5(a)(1) authorizes the filing of a successive application when the claims "have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable [.]" Haynes raises claims that he easily could have raised in his initial state applications. Sections 5 (a)(2) and (3) require a persuasive showing of actual innocence. See Ex parte Davis, 947 S.W.2d 216, 237 (Tex. Crim. App. 1996) (finding that "[t]he 'actual innocence' standard embodied in Subsections 5(a)(2) and 5(a)(3) mirrors that for bringing successive writ applications in federal habeas review of state convictions"). Haynes does not provide a viable argument that he is actually innocent of capital

murder.[4] Because Texas would apply its procedural law to prohibit the filing of a successive state application, staying Haynes' federal petition would insert needless delay into these proceedings.

Finally, as will be discussed in greater depth below, Haynes has not made a compelling showing that, if presented to the state courts, his unexhausted claims would entitle him to habeas relief. Because

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4. The Supreme Court has not recognized actual innocence as an actionable constitutional claim, see Herrera v. Collins, 506 U. S. 390, 400 (1993) , but will allow actual innocence claims to act as a gateway to the consideration of an otherwise-barred constitutional claim, see Schlup v. Delo, 513 U.S. 298, 316 (1995). In making a Schlup actual innocence argument, "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup, 513 U. S. at 324. Haynes makes two arguments to show actual innocence. First, he contends that officer Kincaid was not acting in his official capacity when murdered, thus making his crime not a capital offense under TEX. PENAL CODE § 19.03(a)(1). That argument hardly constitutes newly discovered evidence, but instead echoes Haynes' trial strategy. Second, Haynes alleges that he was high on drugs when he shot officer Kincaid, rendering him unable to form the requisite intent for capital murder. While he supports this argument with a new affidavit vouching for his intoxication in the days before and after the murder, Haynes knew of those facts well before trial. Even so, in Texas "evidence of voluntary intoxication [does not] negate the element of specific intent required for capital murder." Hernandez v. Johnson, 213 F. 3d 243, 250 (5th Cir. 2000). Haynes simply does not provide a viable argument that he is actually innocent.

Haynes does not meet the Rhines factors or show that a state habeas avenue of relief remains open to him, this court will deny his motion to abate.

B. Application of Texas's Abuse-of-the-Writ Doctrine

Respondent argues that Haynes' failure to exhaust claims procedurally bars federal consideration of their merits. If no state habeas avenue of relief remains open to Haynes, returning to the state courts would be futile and exhaustion is technically satisfied. See Woodford v. Ngo, __ U.S. __, 126 S.Ct. 2378, 2387 (2006). "A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" Nobles v. Johnson, 127 F.3d409, 420 (5th Cir. 1997) (quoting Coleman v. Thompson, 501 U.S. 722, 734 n.1 (1991)); see also Edwards v. Carpenter, 529 U.S. 446, 454-55 (2000) ("[T] he judge may not issue the writ if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim.") (Breyer, J. concurring); Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993) (holding that when "it is obvious that the unexhausted claim would be procedurally barred in state court, we will forego the needless 'judicial ping-pong' and hold the claim procedurally barred from habeas review").

A Texas court considering Haynes' unexhausted claims in a successive habeas petition would invoke Texas's abuse-of-the-writ doctrine to procedurally bar that action. Haynes argues that art. 11.071 § 5 is

inadequate to block federal consideration of his unexhausted claims because it is "inconsistently applied, deprives Haynes of due process under the Fourteenth Amendment, and violates the Equal Protection Clause of the United States Constitution." (Docket Entry No. 15 at 54) The Fifth Circuit holds that article 11.071 is an adequate state procedural bar because the rule is strictly and regularly enforced. See Aguilar v. Dretke, 428 F.3d 526, 533 (5th Cir. 2005), cert. denied, __ U. S. __ , 126 S. Ct. 2059 (2006); Hughes v. Dretke, 412 F.3d 582, 595 (5th Cir. 2005), cert. denied, __ U.S. __ , 126 S. Ct. 1347 (2006); Barrientes v. Johnson, 221 F.3d 741, 759 (5th Cir. 2000); Muniz v. Johnson, 132 F.3d 214, 221 (5th Cir. 1998). As Haynes completely failed to raise his challenged claims in state court, and Texas would find any belated attempt to raise them an abuse of the writ, procedural law bars federal consideration of their merits.

C. Haynes' Arguments to Overcome the Procedural Bar

A procedural bar is not insuperable. A federal petitioner may overcome the procedural default of his claims after an adequate showing of cause and prejudice. The Supreme Court has noted that

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of

> federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

Haynes seeks refuge from the procedural bar by arguing that state habeas counsel's ineffective assistance should excuse his failure to exhaust state remedies.[5] However, "alleged infirmities in state habeas proceedings are not grounds for federal habeas relief." Brown v. Dretke, 419 F.3d 365, 378 (5th Cir. 2005), cert. denied, __ U.S. __, 126 S. Ct. 1434 (2006); see also Elizalde v. Dretke, 362 F.3d 323, 331 (5th Cir. 2004); Beazley v. Johnson, 242 F.3d 248, 271 (5th Cir. 2001); Trevino v. Johnson, 168 F.3d 173, 180 (5th Cir. 1999); Duff-Smith v. Collins, 973 F.2d 1175, 1182 (5th Cir. 1992). Under that reasoning "'ineffective assistance of habeas counsel cannot provide cause for a procedural default.'" Henderson v. Cockrell, 333 F.3d 592, 606 (5th Cir. 2003) (quoting Martinez v. Johnson, 255 F.3d 229, 241 (5th Cir. 2001)); see also Ruiz, 460 F.3d at 644. Haynes seeks to distinguish this precedent by arguing that state habeas counsel's representation should serve as cause when he neglects to raise claims that can only be brought in that forum. The Fifth Circuit, however, has repeatedly refused to create such an exception to the procedural bar doctrine.

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5. Haynes also argues that his actual innocence constitutes a fundamental miscarriage of justice that excuses the procedural default of the unexhausted claims. For the same reasons that argument would not meet the requirements of TEX. CODE CRIM. PRO. art 11.071 § 5, Haynes has not made a persuasive showing of actual innocence to allow federal review.

See Elizalde, 362 F.3d at 330; Martinez, 255 F.3d at 240; Beazley, 242 F.3d at 256. Haynes therefore cannot blame habeas counsel for his failure to present the unexhausted claims. Haynes has not made any argument that would justify adjudication of his unexhausted claims.

IV. Alternative Merits Review

While the court cannot grant relief on those claims Haynes has not presented in state court, the court pauses briefly to note that procedural and substantive defects doom the unexhausted claims. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). For instance, Haynes argues that Texas's lethal injection procedure violates the Constitution (claim 12). Recent Supreme Court precedent forecloses *habeas* relief on Haynes' lethal-injection claim. In Hill v. McDonough, __ U.S. __ , 126 S. Ct. 2096, 2102 (2006), the Supreme Court held that challenges to a state's method of execution sound in civil rights, not habeas, law. The court will dismiss Haynes' lethal injection claim without prejudice so that he may advance his arguments by 42 U.S.C. § 1983 or in state court if he so wishes.[6]

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6. Haynes' petition, therefore, is a "mixed" one in that it contains both civil rights and habeas claims. The Fifth Circuit has stated that "in instances in which a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so, entertaining the § 1983 claims" and then adjudicating

(continued...)

Some of Haynes' unexhausted claims rely on the unwarranted extension of federal law. For instance, Haynes argues that the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), renders him exempt from execution because his substance abuse at the time of the murder rendered him mentally incapacitated to the degree that he could not

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6. (...continued)
the remainder of the federal petition. Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987). Several reasons prevent this court from severing Haynes' civil rights claim and considering it before turning to his habeas claims. First, civil-rights plaintiffs face a stringent exhaustion requirement. See Woodford v. Ngo, __ U.S. __, 126 S. Ct. 2378, 2382 (2006); Nelson v. Campbell, 541 U.S. 637, 650 (2004) (stating that federal law "requires that inmates exhaust all available state administrative remedies before bringing a § 1983 action challenging" a state's lethal injection procedure). Even if the court severed Haynes' § 1983 claim, the unexhausted nature of his civil rights claim would compel its dismissal. Second, Congress intended to create a more efficient and quicker review of habeas petitions through the AEDPA. Stopping federal habeas proceedings midstream to consider the merits of claims collateral to Haynes' otherwise-valid conviction and sentence would violate the spirit of the AEDPA. Third, counsel represents Haynes in this matter. The court expects counsel to understand the difference between civil rights and habeas law. Attorneys do not merit the same liberal allowances given to inmates' pleadings. Counsel can act in a timely manner to preserve Haynes' interests by exhausting his state remedies and then seeking appropriate action. The principles of federalism and comity that define current habeas practice cannot be subordinate to a prisoner's right to a forum for challenging the circumstances of his confinement when the petitioner fails to comply with established procedure in asserting his rights.

comprehend his actions. The Atkins Court held that the Constitution exempts mentally retarded offenders from execution. No precedent extends Atkins to substance abuse or any other form of mental impairment. Cf. In re Neville, 440 F.3d 220, 221 (5th Cir. 2006) (finding that Atkins did not exempt mentally ill inmates from execution); In re Woods, 155 Fed. App'x 132, 136 (5th Cir. 2005) (same).

Likewise, Haynes broadly contests Texas's choice to use the death penalty, arguing that its imposition, both in the abstract and in his case, violates both the Constitution and international law (claims 19 and 20). No federal precedent invalidates Texas's use of the death penalty. Haynes' argument asks for an unwarranted and unsupported extension of constitutional law. Similarly, Haynes lodges complaints about his state habeas counsel's performance, but federal law unquestionably shows that such claims are not actionable on federal habeas review. See Trevino, 168 F.3d at 180 ("[I]nfirmities in state habeas court proceedings do not constitute grounds for relief in federal court."). Under Teague v. Lane this court generally cannot create new habeas law.

Most of Haynes' unexhausted claims involve unresolved factual issues. Primarily, those claims attack trial counsel' s efforts, but also charge the prosecution with misconduct. Haynes has apparently spent a significant amount of time developing the factual basis for these claims and has devoted a considerable portion of his already-lengthy petition on those issues. Without addressing the individual basis

for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief.

Particularly, Haynes has taken great pains to develop evidence that he alleges trial counsel should have presented at trial. Yet, as noted by respondent, Haynes' argument is essentially "not that counsels' performance should have been better, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely different manner." (Docket Entry No. 10 at 29) The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes' constitutional rights were protected and viable defenses pursued. Haynes' allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). If the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ. Having addressed those claims that stand in a procedurally inadequate posture, the court now considers the claims for which federal review is fully or partially available.

V. Analysis of Exhausted Claims

Before turning to the merits of Haynes' claims, the court will address the applicability of the AEDPA to Haynes' case. Haynes extensively argues that, for

various reasons, the AEDPA does not govern his claims. Haynes, however, fails to escape Congress's restrictions on federal review. The Texas courts adjudicated the merits of Haynes' exhausted claims, applied procedural law to prevent adjudication of the claims, or a combination of both in alternative rulings. While Haynes complains about the depth of that review or the strength of the state courts' reasoning, the state courts' substantive adjudication of his claims suffices to trigger the AEDPA deference. See Neal v. Puckett, 286 F.3d 230, 235 (5th Cir. 2002)) ("In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural."). Disagreement with the state court adjudication does not negate the statutorily required deference.

By adopting a litigation strategy that distinguishes or ignores the AEDPA, Haynes has left his briefing vulnerable to summary dismissal. Haynes makes no effort to show that the state court's resolution of his claims was deficient under 28 U.S.C. § 2254(d)(1) or (2). In fact, Haynes hardly mentions the state courts' rulings or describe how they unreasonably violated federal law. As Haynes bears the burden of showing entitlement to habeas relief, proceeding in that manner deprives the court of any reasonable basis for finding that the state courts' reasoning did not comply with the AEDPA. While this court could summarily deny Haynes' petition based on his failure to meet his AEDPA burden alone, this court will review the merits of each of his claims under the applicable federal standards.

A. Haynes' Exhausted Ineffective-Assistance-of-Counsel Claims (Claims l(u) and (x))

Haynes raises several complaints relating to his trial counsel's service, but has only exhausted two arguments: that trial counsel prevented him from testifying in his own behalf and that counsel failed to request a limiting instruction for the victim impact testimony. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." Yarborough v. Gentry, 540 U.S. 1, 3 (2003) ; see also Rompilla v. Beard, __ U.S. __ , 125 S. Ct. 2456, 2462 (2005); Wiggins v. Smith 539 U.S. 510, 520 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

To establish deficient performance, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, 466 U.S. at 687. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct." Wiggins, 539 U.S. at 521. Instead, "[tlhe proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

Strickland, 466 U. S. at 688. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." Id. at 689. An ineffective-assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct [,]" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence [.]" Id. at 689-90.

A petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694; see also Wiggins, 539 U.S. at 534. A reasonable probability is one that is sufficient to undermine confidence in the outcome. See Strickland, 466 U.S. at 689; Wiggins, 539 U.S. at 534. The court does not consider prejudice in a vacuum. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

1. Testifying in His Own Behalf

Haynes claims that he wished to testify at the punishment phase, but his attorneys would not let him. The trial record does not give any indication that Haynes wished to testify. Haynes instead bases this claim on an unnotarized affidavit he prepared while incarcerated. State Habeas Record at 67-69. In that document Haynes described how he wanted to testify, but states that his attorneys either convinced him not to or prevented him from doing so. Haynes' affidavit

states that his testimony would have allowed him to avert a capital conviction or death sentence, but does not detail the nature or specifics of his proposed testimony.

Haynes raised this claim on state habeas review. Both of Haynes' trial attorneys submitted affidavits refuting his allegation that they prevented him from testifying. Based on those affidavits, the state habeas court entered the following fact findings :

> 16. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery that trial counsel thoroughly advised the applicant of the potential risks and benefits of testifying during his capital murder trial; that trial counsel wanted the applicant to testify during the suppression hearing, but the applicant indicated that he was too nervous to testify; that the applicant's fear of testifying increased after the jury was impaneled; that the applicant decided not to testify during his capital murder trial; that trial counsels' assessment of the instant case lead them to the conclusion that it was best that the applicant not testify during the applicant's capital murder trial; that the applicant agreed with trial counsels1 recommendation that it was best that the applicant not testify, and the applicant never suggested that he wished to testify; that trial counsel

believed that the facts of the case negated the element of the applicant's knowledge of the victim's status; and, that trial counsel believed that the jury could have concluded that the applicant's self-defense claim was contrived at the last minute because the applicant's alleged defenses were not included in his confession.

17. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery, that the applicant decided not to testify during his capital murder trial, and the applicant's decision not to testify was a voluntary and informed decision, intelligently made, with full knowledge of circumstances, options, and consequences.

18. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery, that the applicant agreed to trial counsels' recommendation that the applicant not testify during his capital murder trial.

State Habeas Record at 151. On that basis, the state habeas court concluded that Haynes had not met either of Strickland's prongs. State Habeas Record at 159. The state habeas court concluded that it was "a voluntary and informed decision, intelligently made, with full knowledge of the circumstances, options, and consequences," and that trial counsel was not

ineffective in advising Haynes not to testify. State Habeas Record at 159.

This court must presume state fact-findings correct. Haynes has not rebutted the findings that he did not want to testify and that trial counsel used strategic decision-making to counsel Haynes in this regard. See 28 U. S. C. § 2254(e)(1). Further Haynes' failure to describe the content of his proposed testimony prevents this court from gauging its impact on his trial.[7] Haynes has simply not met his Strickland (or for that matter, AEDPA) burden with respect to this claim.

2. Requesting a Limiting Instruction

After the prosecution's punishment phase case-in-chief, the defense presented witnesses who discussed Haynes' positive character traits and accomplishments, including his religious devotion, success in school, and non-violent history in prison. The prosecution then called the victim's widow, Nancy Kincaid, in rebuttal. Mrs. Kincaid testified concerning her husband's good character, his relationship with the family, and how much his children missed him. Haynes argues that trial counsel should have asked

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7. Haynes now argues that 'he was the only one who could tell the jury that he fired because he thought, rightly or wrongly, that he was acting in self-defense . . . [and] did not know Sgt . Kincaid was a police officer [.]" (Docket Entry No. 15 at 123) Haynes' affidavit, however, lacks that specificity. Haynes' affidavit obliquely talks about telling his "side of the story" and letting the jury "know what really happened"; Haynes' affidavit does not describe his proposed testimony in detail.

the trial court to instruct the jury only to consider Mrs. Kincaid's testimony in answering the mitigation, but not future dangerousness, special issue.

The Supreme Court has found that the Constitution "erects no *per se* bar" to victim impact testimony, leaving the admission of that evidence to the states. See Payne v. Tennessee, 501 U. S. 808, 827 (1991). Testimony concerning a victim's worth bears no relevance to the future dangerousness issue. Even so, Haynes has not shown that Texas law required the jury to consider that category of testimony only in answering the mitigation special issue. When considering this claim on state habeas review, the Texas courts concluded that Haynes "fail[ed] to cite any authority supporting his ground for relief that [he] was entitled to a limiting instruction[.] State Habeas Record at 154. Haynes makes no better showing on federal review.

Even if counsel should have requested such an instruction, Haynes has not shown that the absence of that limiting language prejudiced his defense. The state habeas court found that Haynes did not meet Strickland's prejudice prong. The trial court informed the jury not to let "sentiment, conjecture, sympathy, passion, public opinion or public feeling" influence their answers to the special issues. Trans. at 451, 453. This instruction, in conjunction with the low chance of the jury finding any basis to discuss officer Kincaid's character when considering Haynes' future dangerousness, prevents Haynes from making a Strickland prejudice showing. Haynes has not shown that the state court adjudication was contrary to, or an

unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1).

B. The Prosecution's Use of Peremptory Challenges (Claims 2 and 5)

Haynes argues that the prosecution based its use of peremptory challenges in jury selection on impermissible racial characteristics. The Court of Criminal Appeals reviewed the jury selection as follows:

> The record establishes that Haynes is African-American and that, of the fifty people in the venire, seven were African Americans and six appeared for voir dire. The State peremptorily struck four of the six and accepted one venirewoman, whom the defense peremptorily struck; one African-American man was seated on the jury. At trial Haynes raised a *Batson* objection, arguing that the State had used roughly thirty-three percent of its strikes to remove approximately eighty percent of the African-Americans from the jury panel. The State offered its racially neutral explanations.

Opinion on Direct Appeal, at p. 14. After reviewing the voir dire of the four black prospective jurors that the prosecution struck and the reasons given for their dismissal, the Court of Criminal Appeals found no reversible error. Haynes reasserts his equal protection claim on federal review.

Under Batson v. Kentucky, 476 U.S. 79 (1986), the prosecution violates the equal protection clause when

it challenges potential jurors solely on the basis of race. A court addresses Batson claims under a three-step, burden-shifting scheme:

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, __ U.S. __, 126 S. Ct. 969, 973-74 (2006) (quotations and citations omitted); see also Johnson v. California, 545 U.S. 162, 168. (2005); Miller-El v. Dretke, 545 U.S. 231, 251-52 (2005).

1. Batson's First Step

After the questioning of all prospective jurors, the prosecution and defense used their peremptory challenges. Tr. Vol. 22 at 5-14. The defense then made the following Batson motion:

> Your Honor, first of all, for the record, I would ask the Court to take judicial notice of the fact that the defendant in this cause, Anthony Cardell Haynes, is a black American. I'd ask the record to further take notice of the fact that of the 50 jurors in the pool – one, two, three, four, five, six, seven, – seven that qualified are [of] African American origin. That with the exception of Mr. Alton Moore, juror number 47, who we were not able to reach, all the other jurors of African American descent were reached.

Tr. Vol. 22 at 14. The prosecution then pointed out that one African American juror had been selected to sit on the jury panel. Tr. Vol. 22 at 14. The prosecution also noted that the defense itself removed one African American potential juror by peremptory strike. Tr. Vol. 22 at 16. The defense responded that

> they used one, two – four of their 13 strikes which is roughly 30 percent of – 33 percent of their strikes, Your Honor, to eliminate roughly 80 percent of those blacks in the [pool.]. We think just the sheer numbers raise a presumption of a racial motive for the strikes, and we would ask the Judge to order that they

> articulate on the record why those black jurors were excluded.

Tr. Vol. 22 at 15. The trial court then required the prosecution to provide a reason for each strike. Tr. Vol. 22 at 16.

Both the trial court and the Court of Criminal Appeals on direct review assumed that Haynes made a prima facie showing of discrimination. "Once a court has taken that step, we no longer examine whether a prima facie case exits." United States v. Webster, 162 F.3d 308, 349 (5th Cir. 1998). This court's "decision, then, must rest on (1) whether the government articulated race-neutral explanations for the exercise of its challenges and (2) whether [the petitioner] has demonstrated that those justifications are pre-textual and that the government engaged in purposeful discrimination." Id.

2. Batson's Second Step

The prosecution provided reasons for its dismissal of several minority potential jurors. Under the second part of the Batson burden-shifting scheme, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Purkett v. Elem, 514 U.S. 765, 768 (1995) (finding the prosecution's explanation that the potential juror had long hair and a beard to be a sufficient race-neutral explanation for the purposes of the second step of the Batson analysis); see also Hernandez v. New York, 500 U.S. 352, 359-60 (1991).[8]

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8. "Under Batson, a prosecutor's explanation for a (continued...)

"In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny. equal protection." Id.; see also Miller-El v. Cockrell, 537 U.S., 322, 339 (2003) ("In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

The prosecution provided an explanation for each of the four potential jurors it dismissed through peremptory challenges: Twanna Kirkling, Melba Goodman, L.V. McQueen, and Betty Owens. The prosecution stated its reason for striking each, beginning with Ms. Kirkling:

> Twanna Kirkling, number 11, the State exercised a strike for Ms. Kirkling because, during her interview, she said capital punishment was a last resort, meaning several times she hesitated in responding to the questions about the death penalty. She never would give a firm conviction, Your Honor. For that purpose, I did not trust her. I would strike her again if I had another strike.

Tr. Vol. 22 at 16. The prosecution also added that

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8. (...continued)
peremptory strike need not rise to the level of a challenge for cause; rather, it merely must contain a clear and reasonably specific articulation of legitimate reasons for the challenge." United States v. Clemons, 941 F.2d 321, 325 (5th Cir. 1991). At the second step, the "race-neutral explanation tendered by the proponent need not be persuasive, or even plausible." United States v. Huey, 76 F.3d 638, 641 (5th Cir. 1996). Instead, the explanation "simply must be race-neutral and honest." Webster, 162 F.3d at 349.

> she looked at capital punishment, she said she sees it as a necessary evil. I felt that it meant indication that there is something impermissible about having such punishment available to the State. She further avoided giving any direct position on capital punishment that it was a viable object for the State and, furthermore, she stated that life, 40 [years], is a justifiable punishment. And for that, since she had a preconceived notion toward capital punishment, we exercised our strike.

Tr. Vol. 22 at 17. With respect to Ms. Kirkling, trial counsel objected that "there were other jurors who articulated the same view that capital punishment is a necessary evil" that the State accepted. Tr. Vol. 22 at 18.

The prosecutor justified dismissing Ms. Goodman as follows:

> Ms. Goodman during – again, these are my impressions of the interview. I think I have a right to have that impression. She opposed death punishment. She refused to answer questions about capital punishment. She reluctantly agree[d] that capital punishment for police officers should be available. She also demonstrated through her demeanor that she was very anti-capital punishment and I have picked a number of capital jurors and I did not trust this juror.

Tr. Vol. 22 at 18. The defense made no argument.

The prosecution found various reasons for excluding Mr. McQueen:

> And where M[r]. McQueen, again, when questioned, M[r]. McQueen would give me all the indications that in responses to my questions by the language of demeanor that he was very weak on the death punishment and did not -- and stated that there were some cases that I could not give a death sentence even if the law permitted such and again I struck him as well.

Tr. Vol. 22 at 18. The defense noted that Mr. McQueen's jury questionnaire indicated support for the death penalty. Tr. Vol. 22 at 18-19.

The prosecution used a peremptory strike on Ms. Owens for both her demeanor and her answers to questions about the death penalty:

> During the interview, this lady's demeanor was one, I guess, the best I can describe it, somewhat humourous. She never did really take on a serious attitude during the interview. She would say one thing but her body language would indicate that this is not her true feeling. And I'm sure [trial counsel] reasonably expected us to strike this lady after she was interviewed because I think [trial counsel] voir dired her and he only talked to her for a very short time because he was very pleased with the things she said, more as she was leaning toward them. If the defendant was found guilty, she would certainly be

> leaning toward a life sentence. And with that, I drew a conclusion in my mind, based on my observation, that she already had a predisposition and would not look at it in a neutral fashion.

Tr. Vol. 22 at 19. Trial counsel, however, objected that Ms. Owens' jury questionnaire suggested that she would favor the prosecution and that her answers on voir dire showed that she could be impartial. Tr. Vol. 22 at 20. The defense then accused the prosecution of removing her because "the State does not want educated blacks on their jury . . . she would probably bring thought processes and that's something the State has consistently shown not to be interested in." Tr. Vol. 22 at 20. The prosecution countered:

> I find that offensive. I tried many cases, I think, in this court and I have tried and I have never had a jury in this court or any court in Harris County, Texas, that consisted of all whites and I find that offensive.

Tr. Vol. 22 at 20. The trial court found the prosecution's explanation to be race neutral. Tr. Vol. 22 at 20.

The Court of Criminal Appeals reviewed the record of each black potential juror that the prosecution dismissed by peremptory challenge. The Court of Criminal Appeals found that the record supported each justification. This is not a for-cause challenge where the trial court must clearly establish disqualifying bias; the record supports the trial prosecutor's

justification in striking the prospective jurors.[9] The court finds that the Court of Criminal Appeals did not err in finding that the prosecution met Batson's second step.

3. Batson's Third Step

When the trial court considered Haynes' Batson objection, Haynes argued that a pattern of improper strikes existed. The prosecution then provided what the trial court considered a race-neutral explanation for the strikes. Moving to the third step of Batson, the defense needed to show purposeful discrimination. At trial, Haynes took issue with the validity of some of the strikes, accusing the prosecution of dishonesty. With each potential juror, Haynes now tries to show that the justification did not match the jury questioning.

Haynes accuses the Court of Criminal Appeals of "uncritical acceptance of the prosecution's reasons for the strikes[.]" (Docket Entry No. 1 at 231) The Court of Criminal Appeals necessarily relied on the trial court's findings to some extent, but also "review[ed] the totality of the circumstances, including the composition of the venire and jury panels, the record of the voir dire examination, and Haynes' rebuttal and impeachment

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9. Haynes argues that there is no record support for the prosecution's challenge to Mr. McQueen. The record weakly shows that Mr. McQueen could not be strongly counted on in the prosecution's favor, and that he would have some difficulty in assessing a death sentence over a long prison term. The prosecution's justification for striking him, however, focused on his demeanor in answering those questions, suggesting that the record possibly belies his feelings as manifested through his in-court deportment.

of the State's explanations." Opinion on Direct Appeal, at 14. The state court fact-findings in this case, particularly the trial court's explicit finding that the prosecution's justifications were not pretextual and its implicit finding that Haynes had not shown purposeful discrimination, merit a presumption of correctness. See Collins, __ U.S. at __ , 126 S. Ct. at 974.[10] Haynes can overcome that presumption through the production of clear and convincing evidence. See 28 U.S.C. § 2254(e)(l). Haynes also bears the ultimate burden of showing that the state court determination was unreasonable. See 28 U. S. C. § 2254(d)(1) . Haynes has not met this burden.

Haynes tries to draw comparison between his case and Miller-El v. Dretke, 545 U. S . 231 (2005), where the Supreme Court granted relief on a Batson claim. In Miller-El, a case where the "selection process [was] replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race," 545 U.S. at 265, the Supreme Court looked at "broader patterns of practice during the jury selection"

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10. Haynes also alleges that the trial court violated his constitutional rights by not having the judge who oversaw the jury selection rule on his Batson objection. While it would be useful to have the same judge who viewed the prospective jurors' demeanor, facial expressions, and attitude rule on Batson issues, Haynes has not shown that the Constitution requires it. Instead, his claim seems to be a vehicle to remove this case from AEDPA deference. The Supreme Court has not held that 28 U. S. C. § 2254(e)(1) does not apply when the trial judge did not observe jury selection. Here, the trial court did not see the particular jurors, but still could observe and make credibility determinations about the prosecutor's motive in making the peremptory strikes.

to find that the prosecution used its peremptory challenges in a discriminatory manner. Miller-El, 545 U.S. at 253. The Miller-El Court noted a "remarkable" pattern of excluding black prospective jurors from the panel: "Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution." Miller-El, 545 U.S. at 240-41. In a side-by-side comparison between the challenged black potential jurors and the white ones, the Miller-El record revealed that white jurors were accepted when voicing views similar to the excluded jurors and showed that the prosecution questioned the black prospective jurors differently than others: The prosecutor's explanations also did not jibe with the record of potential juror questioning. Finally, the Miller-El Court criticized the lower courts for blindly accepting the prosecutor's explanations and, in some cases, creating new justifications for the peremptory strikes.

Haynes has not shown that racism permeated his case like in Miller-El. Importantly, the Miller-El Court faced a case where the prosecutors had a 20-year history of engaging in racial discrimination in the jury selection process. The record contains no such evidence in this case. In fact, when accused of racism the prosecutor in Haynes' trial heatedly defended his race-neutral record in selecting juries. Nothing before the court suggests that a tradition of racism saturated Harris County's jury selection process.

Haynes makes much of the fact that the prosecution used peremptory strikes to exclude four of

six African-American panelists. While Miller-El by no means established a threshold percentage that indicates the use of racism, this case does not present the same glaring evidence as in Miller-El where the prosecution struck or agreed to the removal of 19 of the 20 black potential jurors. See Jackson v. Dretke, 181 Fed. App.'x 400, 407 n.5 (5th Cir. 2006) (finding that the removal of 45% of black potential jurors had "little meaning" without further information).

Haynes takes two approaches in reviewing the record of jury questioning. Haynes tries to show that the record does not support the prosecution's justifications for their peremptory strikes. Haynes then alleges that those justifications are mere pretexts because they would equally apply to jurors the prosecution allowed to serve. Federal review of the cold record provides only a partial view of what transpired at trial. Time and the limitations of not viewing a juror's tone, demeanor, and characterizations may impair an ability to truly compare the statements of two potential jurors. As the Fifth Circuit recently noted in a different context,

> [l]ay persons come to the courthouse with varying levels of education and thought about capital punishment. The opening of a capital trial is an alien environment to citizens called from jobs and homes. Lay persons are confronted by skilled lawyers engaged in an adversarial contest who probe their views on a profound and divisive social issue, usually with a goal of retention or exclusion shaping the questions. We know from experience that

> the result is often a series of responses that seem to shift and turn and even conflict as questions are framed, reframed and just repeated. A stranger to the trial reading the bare transcript is left with incomplete sentences and elliptic answers with no reconciling theme. Yet one present at trial may well have had a quite different picture. Inflection of voice and body movements of each cast member, absent from the transcript, are present at trial.

Ruiz, 460 F.3d at 646. Difficulty in this case arises because the prosecution based its strikes, as in the case of Mr. McQueen and Ms. Owens, not just on potential jurors' statements about the death penalty, but their demeanor and physiognomy in answering. Even so, the record must provide support for the conclusion that the prosecution did not act out of racial animus:

> It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis.

Miller-El, 545 U.S. at 252.

Haynes has not shown that the state courts were unreasonable in finding no purposeful discrimination. Without providing record citations, Haynes argues that

"[w]hile white jurors were mainly asked long 'educational' questions by the prosecution, which asked for only simple 'yes' or 'no' answers, the black jurors were asked for their opinions and feelings on a number of issues, in a very different manner, in what can only be interpreted as an effort to have them disqualified." (Docket Entry No. 1 at 230) The record, however, does not divulge any obvious difference in questioning strategy that hinged on a prospective juror's race.

Haynes also compares jurors whom the prosecution did not dismiss with those who were peremptorily struck to show that race was the only difference between the two. Haynes places special emphasis on the questioning of Michael Bonnin and Sharon Malazzo, who sat on the jury, arguing that their attitudes and answers mirrored those of the struck jurors. Haynes emphasizes that Mr. Bonnin stated that he did not believe in the death penalty in some circumstances. Tr. Vol. 6 at 137. The law does not allow the imposition of the death penalty in all circumstances and Bonnin never displayed an inability to impose the death penalty in those circumstances that the law allows. Mr. Bonnin's answers contrast sharply with the jurors who theprosecution removed such as, for instance, Ms. Goodman who displayed strong feelings against the death penalty in general and specifically to its application to police officers as a special class. Tr. Vol. 9 at 173-81.

Haynes also relies on the fact that Ms. Malazzo stated that she could consider probation as a sentencing option in a homicide case. Tr. Vol. 10 at 296. Ms. Malazzo, however, is hardly similarly

situated to those potential jurors the prosecution excused by peremptory strike because she never waivered on her opinion of capital punishment or showed an incapacity to consider death as a sentencing option. Comparison with those jurors whom the prosecution did not strike does not reveal a racist intent in the prosecution's approach to jury selection.

This is not a case where "[t]he State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did." Miller-El, 545 U.S. at 260. The record provides support for the prosecution's use of peremptory challenges. Haynes has not shown a pattern or practice of discriminatory questioning of minority prospective jurors. The court concludes that Haynes has not established that the Court of Criminal Appeals' rejection of this claim was unreasonable. 28 U. S. C. § 2254 (d) . The court **DENIES** this claim.

C. Actual Innocence Due to the Victim's Off-Duty Status (Claim 3)

Haynes argues that he is actually innocent of capital murder because officer Kincaid was not acting in an official capacity when Haynes shot him. Under TEX. PENAL CODE ANN. § 19.03(a) (l), Haynes' jury could only convict after finding all the elements of murder, plus: (1) the victim was a "peace officer"; (2) the victim was "acting in the lawful discharge of an official duty"; and (3) Haynes knew he was a peace officer. Haynes contends that only two pieces of evidence showed that officer Kincaid was acting in an official capacity: (1) Mrs. Kincaid's testimony that her husband identified himself as a police officer; and (2)

the testimony of Jeraldine Stewart, an assistant Police Chief, who stated that off-duty officers were obligated to investigate any breach of the peace. Haynes disputes that evidence, arguing that a more plausible explanation for officer Kincaid's actions was that he was behaving as a private individual, seeking to exchange insurance information for the damage to his vehicle's windshield. Haynes supports this theory with the same testimony and argument his attorneys presented at trial, such as that the autopsy report listed officer Kincaid's status as "off -duty" at the time of his death. Haynes argues that he was eligible only for a non-capital conviction, thus rendering him actually innocent of capital murder.

Haynes does not advance a cognizable ground for relief. The Fifth Circuit has repeatedly held that Supreme Court jurisprudence has not created an independent actual-innocence claim. See Foster v. Quarterman, 466 F. 3d 359, 367 (5th Cir.), cert. denied, __ U.S. __, 127 S. Ct. 141 (2006); Graves v. Cockrell, 351 F.3d 143, 151 (5th Cir. 2003); Dowthitt v. Johnson, 230 F.3d 733, 741 (5th Cir. 2000); Graham v. Johnson, 168 F.3d 762, 788 (5th Cir. 1999); Robison v. Johnson, 151 F.3d 256, 267 (5th Cir. 1998); Lucas v. Johnson, 132 F.3d 1069, 1074-75 (5th Cir. 1998). This conclusion finds support in Supreme Court precedent. In Herrera v. Collins the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. 390, 400 (1993). Similarly, in Schlup v. Delo the Supreme Court again

noted that a petitioner's "claim of innocence does not by itself provide a basis for relief." 513 U.S. 298, 315 (1995). This is true, in part, because a defendant who has received a fair trial no longer enjoys any presumption of innocence. Herrera, 506 U.S. at 399-400. "Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law of [a] brutal murder[]." Id. at 400. This court cannot grant relief on Haynes' actual innocence claim that is not recognized by the Constitution. See 28 U.S.C. § 2254(a).

The Fifth Circuit has observed that even if such a constitutional claim existed, the petitioner would have to show the following:

> (1) the evidence is newly discovered and was unknown to the defendant at the time of the trial; (2) the defendant's failure to detect the evidence was not due to a lack of diligence; (3) the evidence is material, not merely cumulative or impeaching; and (4) the evidence would probably produce acquittal at a new trial.

Lucas, 132 F.3d at 1076 (citation omitted). Here, Haynes does not rely on "newly discovered evidence." In fact, he does not rely on any evidence at all. See Schlup,5 13 U. S. at 324 ("To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial."). Instead,

he makes arguments that track closely his trial efforts at showing that officer Kincaid was not acting in his official capacity when Haynes shot him. In that regard, the instant claim more closely resembles the Jackson v. Virginia, 443 U.S. 307, 319 (1979), sufficiency-of-the-evidence claim that Haynes exhausted on direct review.

Even if Haynes intends to reassert his Jackson claim, he has not shown entitlement to habeas relief. In determining the sufficiency of the evidence, this court asks "whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U. S. at 319; see also Miller v. Johnson, 200 F. 3d 274, 286 (5th Cir. 2000) (applying the Jackson standard in the capital context). In determining the sufficiency of the evidence, this court may not substitute its view of the evidence for that of the fact-finder, but must consider all of the evidence in the light most favorable to the prosecution and decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U. S. at 319; see also Miller, 200 F.3d at 286.[11]

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11. This court can only grant habeas relief if Haynes shows that the Court of Criminal Appeals unreasonably applied Jackson. See 28 U.S.C. § 2254(d). Haynes' arguments lie at the intersection of two highly deferential standards of review. As previously noted, the AEDPA authorizes a deeply forgiving review of state-court determinations. In habeas sufficiency-of-the-evidence claims, the constitutionally deferential Jackson standard converges with the statutorily

(continued...)

The Court of Criminal Appeals found that sufficient evidence supported Haynes' capital conviction:

> The record established that Sergeant Kincaid was a Houston police officer and that he was off-duty at the time of his death. Assistant Police Chief Jeraldine Stewart testified that department policies require both on-duty and off-duty officers to take prompt and effective police action for any violation of the law committed in their presence. According to Stewart, when an off-duty officer takes such action, he is considered to be discharging his official duty. Stewart testified that Houston police officers are authorized to investigate

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11. (...continued)
mandated federal habeas standards to create a most daunting burden for federal petitioners. See Garcia v. Carey, 395 F.3d 1099, 1103 (9th Cir. 2005) (noting that the AEDPA "adds a second level of deference" to the Jackson standard); Torres v. Mullin, 317 F.3d 1145, 1151 (10th Cir. 2003) ("[The] AEDPA ha[s] added an additional degree of deference to state courts' resolution of sufficiency of the evidence questions."). A petitioner must not only show that a rational juror could not have found him worthy of death, he must show that the state court was unreasonable in its assessment of his arguments. The doubly deferential standard utilized in habeas insufficiency claims creates a high, though not completely insurmountable, barrier to federal habeas relief. The court, therefore, reviews the state court's prosecution-friendly Jackson analysis not for error, *per se*, but to decide if the Court of Criminal Appeals unreasonably applied Jackson to Haynes' case or refused to extend Jackson to the operative facts of the case. See Williams v. Taylor, 529 U.S. 362, 407 (2000).

> any offense threatening the public safety outside the City of Houston. Stewart testified that she had reviewed the police report and determined that Sergeant Kincaid had been performing an official duty when he stopped Haynes.

Opinion on Direct Appeal, at 3. On that basis, the Court of Criminal Appeals held that "[a] rational juror could have concluded from this evidence that Sergeant Kincaid was acting in the lawful discharge of an official duty when he was killed." Opinion on Direct Appeal, at 3.

Haynes fails to show that the state court's determination was unreasonable. Haynes' argument emphasizes that officer Kincaid was "off duty" when he encountered Haynes, but the trial testimony still allowed for the discharge of his "official duty" as required by statute. As recognized by the Court of Criminal Appeals, officer Kincaid could have been acting as a police officer when asking for Haynes' license. Given these facts, viewed in a light most favorable to the prosecution, a reasonable juror could have reached the conclusion that officer Kincaid acted in the lawful discharge of an official duty when Haynes shot him. Haynes has not proved that his challenge to officer Kincaid's status mandates relief in either the actual-innocence or sufficiency-of-the evidence context.

D. Prosecutorial Misconduct (Claim 6)

Haynes contends that the prosecution made several improper statements that prejudiced his case and rendered his trial fundamentally unfair. Haynes

cites several examples of questions and statements that the prosecution made, which he considers improper or inflammatory in nature. When Haynes raised a similar challenge in state court, however, he only objected to one portion of the prosecution's closing argument. This court can only consider the portions of Haynes' prosecutorial misconduct claim that he exhausted in state court.[12]

The exhausted portion of Haynes' claim relates only to the prosecution's punishment phase argument, which began with the prosecutor stating that his argument "comes from the heart." Tr. Vol. 30 at 14-15. Haynes particularly faults the prosecution for the following interchange during final arguments:

> The State: But let's just look at May the 22nd, 1998, before Sergeant Kincaid was merciless[ly] killed. The defendant goes up. It's his idea[]. He listens to the tape. He wants to get some gas money. Gas money for his truck. He could have asked his mom, he could have asked his dad. He'd rather steal. He goes to some unknown person in a parking lot at Willowbrook Mall, hey, buddy, can you give me directions to so and so. The guy starts giving him directions. *I'll bet the next time*

12. The court notes, however, that a review of the entirety of Haynes' prosecutorial misconduct claim does not suggest that the prosecution violated his constitutional rights.

someone comes or hollers at you to give directions you are going to think about him, look at him. He looks so innocent he couldn't hurt anybody. And that is what those three people that night thought. And before you walk up to another car – I know I would. I'm not going to walk up. I'm going to step back and maybe I'll tell them the directions but I'm not going –

Trial counsel: Your Honor, I'm going to go ahead and object at this time to what he would do. It is improper. He is testifying, giving his opinion.

Trial court: Sustained.

Trial counsel: I ask the jury to be instructed to disregard.

Trial court: The jury will disregard that.

Trial counsel: Move for a mistrial, Your Honor.

Trial court: Denied.

The State: *You know your whole life is going to change because of this trial. You know-*

Trial counsel: I'm going to object to that comment, too, Your Honor, that their whole life is going to change. That's improper jury argument. That's him personalizing with the

jury, which is outside the record and improper jury argument.

Trial court: It's overruled.

Tr . Vol . 30 at 17-18 (emphasis added). When trial counsel objected to another statement by the prosecution, the trial court ordered trial counsel to sit down or face removal from the courtroom. Tr. Vol. 30 at 18-19. Trial counsel made no more objections during the prosecution's final argument, even when the prosecution told the jury that officer Kincaid "would be alive today if he hadn't" identified himself as a police officer. Tr. Vol. 30 at 232. The state habeas court found that these statements did not violate Haynes' constitutional rights.[13]

"In habeas corpus proceedings, [this Court] review[s] allegedly improper prosecutorial statements under a strict standard." Dowthitt, 230 F.3d at 755. A federal habeas court's review of prosecutorial misconduct claims is "'the narrow one of due process, and not the broad exercise of supervisory power.'" Darden v. Wainwright, 477 U.S. 168, 180 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642

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13. When Haynes raised this claim on state habeas review the state courts procedurally barred the portion of this claim based on statements to which trial counsel did not object. State Habeas Record at 160. In a footnote respondent asks this court to forego federal review based on that determination. Any procedural bar would only apply to the portion of the prosecution's statement to which trial counsel did not object.

(1974)).[14] Accordingly, "'[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict.'" United States v. Bernard, 299 F.3d 467, 488 (5th Cir. 2002) (quoting United States v. Iredia, 866 F.2d 114, 117 (5th Cir. 1989)); see also Styron v. Johnson, 262 F.3d 438, 449 (5th Cir. 2001); Ortega v. McCotter, 808 F.2d 406, 408 (5th Cir. 1987) ("'A prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most egregious cases.'").[15]

Haynes objects to three categories of argument: (1) the prosecution's assurance that his argument came

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14. The Supreme Court relied on six factors in evaluating the due process claim in Darden: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused, (3) whether defense counsel invited the comments, (4) whether the curative instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defense had an opportunity to rebut the prosecutor's comments. While the Supreme Court looked at these factors, it did not purport to establish a constitutional test based on them. Other factors may influence a court's review. Also, the Supreme Court did not accord any particular weight to the above-mentioned factors. In the end, this court's ultimate review focuses on whether the comments rendered the trial fundamentally unfair. See Darden, 477 U.S. at 181.

15. Under Texas law closing arguments must be based on trial evidence, the logical assumptions flowing from that evidence, a response to defense argumentation, or a plea for law enforcement. See Wilson v. State, 7 S.W.3d 136, 147 (Tex. Crim. App. 1999).

from the heart, (2) the prosecution's personalization of Haynes' robberies, (3) the speculation that officer Kincaid would be alive had he not identified himself as a police officer. First, while the prosecutor stated that his argument came "from the heart," that statement in and of itself bore no prejudice to Haynes and added little, if anything, to the jury's consideration of the special issues. Second, the trial court instructed the jury to disregard the greater portion of those statements in which the prosecutor discussed the murder's impact on his, and the jury members', life. "'[J]uries are presumed to follow their instructions.'" Zafiro v. United States, 506 U.S. 534, 540 (1993) (quotation omitted); see also Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant."). This presumption exists "unless there is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect [of the prosecutorial misconduct] is devastating." United States v. Tomblin, 46 F.3d 1369, 1390 (5th Cir. 1995) (internal quotation marks and citation omitted); see also United States v. Wyly, 193 F.3d 289, 299 (5th Cir. 1999). Haynes has not described any deficiency in the trial court's curative instruction. There is no indication that the trial court's instruction was insufficient to remove any prejudice introduced by the State's comment. The only portion of the statements that the trial court did not instruct the jury on – that

the trial would change the jury's life – did not itself render Haynes' trial fundamentally unfair. That statement neither increased the likelihood of Haynes' receiving a death sentence nor brashly disregarded the Constitution.

Finally, the prosecutor speculated that Haynes only killed officer Kincaid because of his status as a police officer. In considering a related claim on direct appeal, the Court of Criminal Appeals did not find anything in that portion of the prosecution's argument that would violate the Constitution. Opinion on Direct Appeal, at 21-22. By the time the prosecutor made that statement, the jury had already returned a verdict that, in essence, found that Haynes knew that his victim was a police officer. The evidence amply allowed the prosecutor to suggest that the victim's status alone brought about his death. In fact, that assumption formed the heart of the prosecution's case. The Constitution by no means prohibits prosecutors from making reasonable and logical deductions from the evidence. Haynes has failed to shown that the prosecution engaged in misconduct that made his trial fundamentally unfair. See 28 U.S.C. J 2254(d)(l). The court **DENIES** this claim.

E. The Admissibility of Audiotaped Statements (Claims 7 and 8)

At trial the prosecution presented two audiotaped confessions in which Haynes admitted to shooting officer Kincaid. Haynes challenged the admissibility of both statements before trial. Officer Todd William Miller, a homicide investigator with the Houston Police Department who took both Haynes' confessions, was

the only person to testify at trial about the circumstances leading to Haynes' arrest and his subsequent statements. Officer Miller testified that Timothy Reese became an early suspect in officer Kincaidis murder. The police secured a warrant for Reese and set up surveillance at his home. On May 24, 1998, Reese returned to his house but soon left with another individual, later identified as Haynes, in a vehicle matching the description of the one driven by the murderer. Officer Miller arrested the two men in the car. Officer Miller gave three reasons for arresting Haynes: (1) he admitted to owning the vehicle matching the one driven by the murderer, (2) his vehicle also matched one used as a get-away car in a robbery, and (3) Haynes matched Mrs. Kincaidis description of the murderer. The police took Haynes to the police station and officer Miller interviewed him, resulting in the two audiotaped statements in which Haynes confessed to the murder. The trial court allowed the statements to come before the jury.

Haynes' federal habeas petition raises two claims challenging the admission of the audiotapes. First, Haynes argues that the police had no probable cause to arrest him, and thus the Fourth Amendment should have prevented his statements from coming before the jury. Second, Haynes contends that the circumstances surrounding his confession rendered those admissions involuntary and unreliable. The Court of Criminal Appeals rejected both arguments on direct appeal. This court will review that determination under the AEDPA standard.

1. Fourth Amendment Claim

Haynes contends that the trial court should have suppressed his audiotaped statements because of the police officer's illegal "seizure" of his person, thus violating the Fourth and Fourteenth Amendments. Federal law prevents this court from considering the merits of Haynes' Fourth Amendment claim. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494 (1976) (footnote omitted). The existence of state processes allowing an opportunity for full and fair litigation of Fourth Amendment claims, rather than a defendant's use of those processes, serves the policies underlying the exclusionary rule and bars federal habeas corpus consideration of claims under Stone. See Caver v. State of Alabama, 577 F.2d 1188, 1192-93 (5th Cir. 1978). The Stone bar applies despite an error by the state court in deciding the claim's merits. See Swicegood v. Alabama, 577 F.2d 1322, 1324-25 (5th Cir. 1978). Stone applies to capital cases. See Jones v. Johnson, 171 F.3d 270, 278 (5th Cir. 1999); Lucas, 132 F.3d at 1083; Andrews v. Collins, 21 F.3d 612, 631-32 (5th Cir. 1994).

Haynes seeks to skirt Stone's constraints by alleging that he did not have a full and fair opportunity to develop his claim in state court. Haynes also alleges that the state court's reasoning in rejecting his claim failed to appreciate fully that no probable cause existed

for his arrest. Further, Haynes argues that the trial court's failure to issue written factual findings and legal conclusions resulted in a less-than-full and not-quite-fair hearing. Thus, Haynes argues that Stone should not bar consideration of his Fourth Amendment claim.

"Errors in adjudicating Fourth Amendment claims are not an exception to Stone's bar." Moreno v. Dretke, 450 F.3d 158, 167 (5th Cir. 2006); see also Spicegood, 577 F.2d at 1324-25. The Fifth Circuit has emphasized that the "'opportunity for full and fair litigation' [means] just that: 'an opportunity.'" Janecka v. Cockrell, 301 F.3d 316, 320 (5th Cir. 2002) (quoting Caver, 577 F.2d at 1192). "[A]bsent additional allegations that state processes routinely or systematically are applied in such a way as to prevent the actual litigation of Fourth Amendment claims, mistakes that thwart the presentation of Fourth Amendment claims do not render the Stone bar inapplicable." Janecka, 301 F.3d at 321.

Haynes had an opportunity to present his claims before trial – an opportunity of which he took full advantage. Haynes availed himself of the full and fair chance to present his claims to the Court of Criminal Appeals. Even if the state trial court's reasons for denying the claim were not completely evident or satisfying to Haynes, the Court of Criminal Appeals adjudicated this claim. Disagreement with the outcome does not remove the Stone bar. Because Haynes took advantage of the opportunity to present

his claims in state court, Stone requires this court to forego a renewed analysis of the "seizure."[16]

2. Fifth Amendment Claim

Haynes also alleges that he did not voluntarily confess to the murder. Haynes contends that his youth

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16. Even if Stone did not bar federal consideration of Haynes' Fourth Amendment claim, the Court of Criminal Appeals adequately addressed this claim on direct review:

> Although great weight should be given to the inferences drawn by the trial judge, determinations of probable cause are reviewed de novo on appeal. At the suppression hearing, officer Miller testified that Haynes ran "a couple of stop signs" in his presence immediately before his arrest. Section 544.010(a) of the Texas Transportation Code defines this as an offense, and § 543.001 authorizes police officers to arrest, without a warrant, a person who commits such a violation in his presence. In addition, Article 14.01 (b) states that a peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. So Haynes' arrest was authorized by law. An arrest for offenses committed in the presence of an officer, even minor offenses, is constitutionally reasonable. As the State notes, Miller's assertion at the hearing that he did not arrest Haynes for the traffic offense is unimportant. The subjective intent of the arresting officer does not alter the fact that his arrest was authorized by law and reasonable for the purposes of the Fourth Amendment.

Opinion on Direct Appeal, at 6-7.

made his confession involuntary, in conjunction with other factors including that he

> did not eat anything during the course of or prior to his interrogation, was not afforded an opportunity to use the restroom, was not provided the opportunity to call his father despite frequent requests and was extremely fatigued . . . was not able to pay attention during this interrogation [and] . . . was under the influence of methamphetamine.

(Docket Entry No. 1 at p. 287) Haynes also contends that he "was deliberately not taken before a magistrate as required prior to his interrogation and the making of his first statement." (Docket Entry No. 1 at 287) Haynes argues that officer Miller overbearingly manipulated the circumstances to overcome his will.

"A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice." United States v. Broussard, 80 F.3d 1025, 1033 (5th Cir. 1996). "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception . . . ." Oregon v. Elstad, 470 U.S. 298, 305 (1985). [C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986).

"Cases in which a defendant can make a colorable argument that a self-incriminating statement was

'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984); see also Dickerson v. United States, 530 U.S. 428, 444 (2000). Similarly, "Miranda protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." Connelly, 479 U.S. at 170. "[B]oth the characteristics of the accused and the details of the interrogation" should be considered in determining voluntariness. Schneckloth v. Bustamonte, 412 U. S. 218, 226 (1973).

The state court's finding that the police did not engage in coercive tactics is a factual question that this court presumes correct. See Carter v. Johnson, 131 F. 3d 452, 462 (5th Cir. 1997); 28 U.S.C. § 2254(e)(1). The Court of Criminal Appeals competently reviewed the facts surrounding Haynes' confession in a way vastly different from that alleged in Haynes' petition:

> At the hearing on Haynes' motion, [Officer] Miller's uncontroverted testimony was the only evidence before the trial court. According to Miller, Haynes arrived at the police station at about 11:52 p.m. Miller did not take Haynes to the magistrate because he wanted to first ascertain his involvement, if any, in the aggravated robberies and the capital murder. He removed Haynes' handcuffs and placed him in an interview room. Miller removed his weapon and entered the interview room. Miller advised Haynes that he was a suspect in the robberies and the murder of

Sergeant Kincaid and read Haynes his Article 38.22 warnings (satisfying Miranda's requirements). Haynes indicated that he understood his rights but that he did not wish to assert them. Miller and Haynes were alone during the interview which produced Haynes' first statement. Haynes was seated in a cushioned armchair. Several times in the course of the interview, Miller offered Haynes something to eat and drink, and the opportunity to use the restroom or telephone. According to Miller, Haynes declined to use the phone, used the restroom once, and requested water two or three times. Miller testified that Haynes was awake and alert during the entire interview. At no time did Haynes indicate that he wanted to speak to an attorney or terminate the interview.

Initially, Haynes denied involvement in the offenses but changed his story when Miller informed him that his accomplice, Timothy Reese, had implicated him in the murder, that officers were on their way to pick up another accomplice, and that there were eyewitnesses. Haynes asked Miller what would happen if he gave a statement, and Miller replied that he did not know because he did not know what Haynes was going to say. Haynes agreed to give an audio-taped statement. From 12:32 a.m. to 12:52 a.m. Haynes gave his first statement.

> At 1:28 a.m. Miller took Haynes before the magistrate. Haynes asked the magistrate when he could make a phone call. The magistrate replied that he could do so after the proceedings were complete. When they returned to Miller's division at 1:40 a.m., Haynes asked to use the restroom, and after he used the restroom, Miller asked him if he wanted to use the telephone. Haynes declined, saying that it was too late to call anyone. Miller told Haynes that he would be booked into the jail shortly and asked if there was anything else that Haynes wanted to say. Haynes responded that he had left out some details in his first statement, so Miller offered him the opportunity to make a second statement. Miller again read Haynes his rights before taking his statement.

Opinion on Direct Appeal, at 8-10. After reviewing the suppression hearing testimony, the Court of Criminal Appeals found that Haynes' statement "was the product of his free and unconstrained choice." Opinion on Direct Appeal, at 10.

Ultimately, the voluntariness of a confession is a legal determination. See Miller v. Fenton, 474 U.S. 104, 112 (1985). The transcript from the suppression hearing reveals that Haynes was informed of his rights and waived those rights. The record contains no indication that Haynes' waiver of his rights was involuntary or that the circumstances surrounding his confession were somehow oppressive, especially in light of officer Miller's testimony, which the trial court

obviously found credible. Haynes has not demonstrated that the state court's adjudication of this claim was contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1). This claim is **DENIED**.

F. Refusal to Strike Potential Jurors (Claim 9)

Haynes complains that the trial court violated his rights under the Sixth and Fourteenth Amendments by not granting his challenges for cause against potential jurors Melba Williams, John Ruben Munoz, Jacqueline Emhoff Nelson, and Horace B. Snyder. Haynes used a peremptory challenge to remove Williams, Munoz, and Snyder from the jury panel. Thus, they were "removed from the jury as effectively as if the trial court had excused [them] for cause." Ross v. Oklahoma, 487 U.S. 81, 86 (1988). Under federal precedent "[a]ny claim that the jury was not impartial, therefore, must focus not on [the peremptorily challenged jurors], but on the jurors who ultimately sat." Id. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." Id. at 88; see also Webster, 162 F. 3d at 342 n. 36 ("The failure properly to grant a challenge for cause rises to the level of a constitutional violation and warrants reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. Absent such a showing, the defendant has not been denied his Sixth Amendment right to an impartial jury."). Therefore, this court's focus "begins and ends" with a determination of whether a juror who sat possessed "views [that] would

prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quotation omitted); see also Jones v. Dretke, 375 F.3d 352, 356 (5th Cir. 2004) ("Following Ross, . . . our review of Jones's Sixth Amendment claim is limited to whether the jurors that actually sat were impartial.").

Other than to generally allege that his jury was not impartial, Haynes only identifies two jurors whom he felt could not evaluate the evidence impartially. First, Haynes argues that the expenditure of all his peremptory challenges forced him to accept an "objectionable" juror, Jon Wilcox. A constitutional violation only occurs when the jury that sits is not "impartial." Ross, 487 U.S. at 85. Courts have recognized that Ross does not establish a low-threshold for demonstrating error; to grant relief courts have found that the juror for which a petitioner would have expended a peremptory challenge must not be "partial," that is, "properly subject to strikes for cause." Nethery v. Collins, 993 F.2d 1154, 1161 n.20 (5th Cir. 1993); see also United States v. Martinez-Salazar, 528 U.S. 304, 313 (2000) (finding that error under Ross results when a court seats any juror "who should have been excused for cause"); Webster, 162 F. 3d at 341-42 (distinguishing between an objectionable and partial juror); Nichols v. Scott, 69 F.3d 1255, 1287 (5th Cir. 1995) (focusing on the impartiality of jurors). Haynes does not specify why Wilcox was an "objectionable juror," and much less why the trial court should have removed him for cause.

Second, Haynes argues that the trial court erroneously denied his challenge to juror Nelson. Trial counsel objected to Ms. Nelson "for her equating possibility and probability," Tr. vol. 10 at 200, apparently referring to the following discussion during her voir dire:

Trial counsel:	Okay. Now, Mrs. Nelson, when you look at that word probability in the first special issue, does probability seem to say the same things as possibility or chance? Or do you think probability requires them to show more?
Ms. Nelson:	I associate probability with possible.
Trial counsel:	Okay. You think probability means the same thing as possibility?
Ms. Nelson:	Yes.

Tr. Vol. 10 at 191. Trial counsel did not pursue this line of questioning further or make any attempt to clarify the legal distinction between those terms with respect to the future dangerousness special issue.

This court's inquiry focuses on whether the potential juror's views would "'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" Wainwright, 469 U. S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1985)). Haynes' failure to develop this issue in jury selection hinders this court's ability to

find that Ms. Nelson's views would have prevented her ability to be an impartial juror. The brief mention of the future dangerousness issue's "probability" language showed some confusion on her part. However, " [w]here a party seeks to exclude a venire member because of bias, that party must demonstrate through questioning that the potential juror lacks impartiality." Fuller v. Johnson, 114 F.3d 491, 499-500 (5th Cir. 1997). Texas state law will not find potential jurors to be biased or prejudiced against the law unless the law is first explained to them. See Sells v. State, 121 S.W.3d 748, 759 (Tex. Crim. App. 2003); Chambers v. State, 903 S.W.2d 21, 29 (Tex. Crim. App. 1995). The failure of Haynes to explore the issue with Ms. Nelson prevented him from developing a record of whether she "could set aside her personal opinions and apply the law, or whether those beliefs would distort her view of the facts or alter her answers to the two special issues." Fuller, 114 F.3d at 500. Other than to refer to the meager record on this issue, Haynes has not shown that Ms. Nelson was not an impartial juror.

Haynes removed by peremptory challenge three of the potential jurors whom the trial court refused to excuse for cause. Haynes has not shown that the fourth potential juror, or any other juror who sat at trial, could not impartially consider his case. The state court's judgment, therefore, survives review under the AEDPA. The court will deny this claim.

G. Statutory Requirement of Jury Unanimity (Claims 11 and 14)

Haynes argues that the trial court's punishment phase instructions confused the jury and made a death

sentence more likely. The trial court instructed the jury that any answer to Texas's special issues that could result in Haynes receiving a death sentence must be unanimous, but that ten or more jurors would have to agree to any answer supporting a life sentence. Trans. at 453. The trial court fashioned those instructions after then effective TEX. CODE CRIM. PRO. art. 37.071. In Texas this is commonly called either the "10-12" or "12-10" Rule. See Resendiz v. State, 112 S.W.3d 541, 548 (Tex. Crim. App. 2003); Prystash v. State, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999). The trial court did not inform the jury that a failure to reach the required consensus in answering the special issues would automatically result in a life sentence. Haynes contends that, by not informing the jury of the effect of a single dissenting vote or of a single holdout juror the instructions predisposed the jurors to impose a death sentence, thus violating the Eighth Amendment.

Haynes argues that the trial court should have instead instructed the jury that should any juror refuse to answer the special issues in unanimity with the others, Haynes would receive a life sentence. At the time of trial TEX. CODE CRIM. PRO. art. 37.071 (g) prohibited the parties and the trial court from providing the jury with that information. The Court of Criminal Appeals rejected this claim because "Haynes's arguments are indistinguishable from arguments [that court] ha[s] repeatedly addressed and rejected." Opinion on Direct Appeal, at 18.

The non-retroactivity principle established in Teague v. Lane, 489 U.S. 288 (1989), bars this Court

from granting relief on Haynes' "12-10 rule" claim. Teague precludes federal relief on claims that impose a new obligation not "'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461, 467 (1993) (quoting Teague, 489 U.S. at 301). The Fifth Circuit has previously addressed virtually indistinguishable claims to the one before this court and found them to violate Teague. See Alexander v. Johnson, 211 F. 3d 895, 897 (5th Cir. 2000); Davis v. Scott, 51 F.3d 457, 466 (5th Cir. 1995); Webb v. Collins, 2 F.3d 93, 95-96 (5th Cir. 1993). The Fifth Circuit has found that nothing in Supreme Court precedent requires Texas to inform a capital jury about the effect of any non-unanimous or holdout jurors. See Alexander, 211 F.3d at 897; Webb, 2 F.3d at' 95-96. Haynes does not show the applicability of any exception to the Teague doctrine or otherwise distinguish the Fifth Circuit's binding precedent. Accordingly, Teague's non-retroactivity bar forecloses relief on Haynes' "12-10 rule" claim.

The Fifth Circuit has also expressly found similar claims to be without merit. See Alexander, 211 F.3d at 897 n. 5; Miller v. Johnson, 200 F.3d 274, 288-89 (5th Cir. 2000); Jacobs v. Scott, 31 F.3d 1319, 1328-29 (5th Cir. 1994). Finding support in the Supreme Court case of Jones v. United States, 527 U.S. 373 (1999), the Fifth Circuit recognizes that the Constitution creates no right to instruct a jury on potential deadlock. See Alexander, 211 F.3d at 897 n.5. Haynes fails to distinguish the binding federal precedent rejecting the merits of this claim.

Haynes' "12-10 rule" claim is both Teague-barred and without merit. The state court's rejection of this claim, therefore, was not contrary to or an unreasonable application of federal law. See 28 U.S.C. § 2254(d) (1).

H. Burden of Proof on and Appellate Review of Texas's Mitigation Special Issue (Claim 13)

Haynes argues that Texas's capital sentencing scheme violates the federal Constitution because it fails to allocate a burden of proof for, and then gives no opportunity for appellate review of, the mitigation special issue. Respondent argues in a footnote that Haynes procedurally defaulted this claim in state court. The state habeas court found that since "a post-conviction writ of habeas corpus should not be used as a substitute for direct appeal," the court could not consider the merits of that argument. State Habeas Record at 148, 158. This state procedural ruling serves as a bar to federal consideration of his claim's merits. See Aguilar, 428 F.3d at 535. Since Haynes makes no effort to surmount the procedural bar, this court need not consider his challenge to Texas's mitigation special issue.

In the interest of justice, however, this court also finds that his barred claim does not present a viable ground for habeas relief. The state habeas court alternatively found that Haynes

> fail[ed] to show (a) that his constitutional rights were violated based on the lack of a burden of proof in the mitigation issue; (b) that the lack of such burden of proof prevents

> meaningful appellate review; (c) and that TEX. CODE CRIM. PROC. ANN. art. 44.251 requires a sufficiency review of a negative answer to the mitigation special issue.

State Habeas Record at 158. Haynes must show that this alternative determination was contrary to or an unreasonable application of federal law. See 28 U.S.C. § 2254(d)(1).

1. Burden of Proof on Mitigating Special Issue

Haynes argues that the prosecution should bear the burden of proof with respect to the mitigation special issue, presumably requiring the prosecution to disprove the absence of mitigating circumstances beyond a reasonable doubt. The trial court's instructions did not assign a specific burden to either party on the second special issue, but generally stated that "[t]he burden of proof in [the punishment] phase still rests upon the State and never shifts to the defendant." Trans. at 450. Under Texas law "[n]o burden of proof exists for either the state or the defendant to disprove or prove the mitigating evidence. Thus, each juror individually and subjectively determines what evidence, if any, is sufficient to mitigate against the imposition of the death penalty." Woods v. Cockrell, 307 F.3d 353, 359 (5th Cir. 2002) (citing Colella v. State, 915 S.W.2d 834, 844 (Tex. Crim. App. 1995)); see also Prystash, 3 S .W. 3d at 535. However, the practical reality of trial anticipates that a capital defendant will present mitigating evidence, *implicitly* placing on the defense a burden of production to present mitigating evidence and to convince the jury of its significance. See Lawton v. State, 913 S.W.2d

542, 557 (Tex. Crim. App. 1995) ("[T]he burden is implicitly placed upon appellant to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case.").

Haynes' proposed assigning of a burden for the prosecution to disprove mitigating evidence "ignores the distinction the [Supreme] Court has often recognized between facts in aggravation of punishment and facts in mitigation." Apprendi v. New Jersey, 530 U.S. 466, 490 n.16 (2000) (citations omitted). Supreme Court authority anticipates that

> [s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton v. Arizona, 497 U.S. 639, 650 (1990).[17] Supreme Court precedent does not contain "any hint of [such] a limiting principle." Id. at 688. The Fifth Circuit in rejecting similar claims has held that 'no Supreme Court or Fifth Circuit authority requires the

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17. The Supreme Court in Ring v. Arizona, 536 U.S. 584, 598 (2002), recently reversed Walton's holding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." The Supreme Court, however, did not overrule Walton's consideration of the burden of proof regarding mitigating evidence. See Ring, 536 U.S. at 609.

State to prove the absence of mitigating circumstances beyond a reasonable doubt." Rowell v. Dretke, 398 F.3d 370, 378 (5th Cir. 2005); see also Martinez v. Dretke, 173 Fed. App'x 347, 354 (5th Cir. 2006) (unpublished); Lewis v. Cockrell, 58 Fed. App'x 596 (5th Cir. 2003) (unpublished); McWilliams v. Cockrell, 74 Fed. App'x 345, 349-50 (5th Cir. 2003) (unpublished).

Here, the State proved the elements of capital murder beyond a reasonable doubt in the guilt/innocence phase. The trial court's instructions also informed the jury that the State had the responsibility of showing future dangerousness beyond a reasonable doubt. Trans. at 452. Texas does not violate the Constitution by expecting the defense to present mitigating evidence in the punishment phase; the practical reality of trial assumes that a capital defendant will present mitigating evidence. In fact, any burden implicitly transferred to the defense by the second special issue is logically related to trial counsel's Sixth Amendment obligation to investigate and prepare mitigating evidence. The second special issue's recognition of that fact does not violate the Constitution. Since no Supreme Court authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt, this court could not rule otherwise except by creating a new rule of constitutional law in violation of Teague.

2. Meaningful Appellate Review of the Mitigation Special Issue

Haynes also contends that the Constitution requires a state appellate court to review an inmate's

mitigating evidence, presumably in much the same way that it can consider the sufficiency of the evidence supporting an inmate's conviction under Jackson v. Virginia, 443 U.S. 307 (1979). Haynes argues that the Court of Criminal Appeals' refusal to reconsider and reweigh the mitigating evidence a capital defendant presented at trial violates the Constitution's guarantee to meaningful appellate review.

"[M]eaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, 428 U.S. 153, 195, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Fifth Circuit, however, has repeatedly rejected claims that the Constitution requires the Court of Criminal Appeals to reconsider the jury's evaluation of the mitigating evidence. See Rowell, 398 F.3d at 377; Johnson v. Cockrell, 306 F. 3d 249, 256 (5th Cir. 2002); Woods v. Cockrell, 307 F.3d 353, 359-60 (5th Cir. 2002); Beazley, 242 F.3d at 261; Moore v. Johnson, 225 F.3d 495, 506-07 (5th Cir. 2001); Hughes v. Johnson, 191 F.3d 607, 621-23 (5th Cir. 1999).[18] Haynes makes no attempt to distinguish the binding Fifth Circuit precedent that governs this claim.

No federal precedent anticipates that a capital defendant has a right to appellate *mitigation* review, though the Supreme Court has repeatedly emphasized that a State must provide meaningful appellate review

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18. The Fifth Circuit also has summarily dismissed similar claims in unpublished decisions. See, e.g., Fuentes v. Dretke, No. 03-20456, 2004 WL 256559 (5th Cir. Feb. 11, 2004); Reneau v. Cockrell, 01-50371 (5th Cir. Dec. 5, 2001); Baker v. Cockrell, No. 01-20308 (5th Cir. Oct . 19, 2001).

of death sentences. See, e.g., Parker v. Dugger, 498 U.S. 308, 321 (1991); Clemons v. Mississippi, 494 U.S. 738, 749 (1990). Meaningful appellate review requires "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983); see also Parker, 498 U.S. at 321. This appellate review, however, must give way to the Supreme Court's "much more explicit directives" that respect a jury's "narrowly cabined but unbridled discretion to consider any mitigating factors submitted by the defendants and weighed as the jury sees fit . . . . " Moore, 225 F.3d at 506-07. The Court of Criminal Appeals allows the jury unbridled discretion in its evaluation of mitigating circumstances and refuses to review whether sufficient evidence supported the jury's answers to the mitigation special issue. See, e.g., McFarland v. State, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996) ("Because the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror, we decline to review that evidence for 'sufficiency.'"). By bestowing upon the jury the narrowly cabined, but unbridled, discretion to consider mitigating evidence, Texas has "followed Supreme Court instructions to the letter." Moore, 225 F.3d at 506. Accordingly, "[n]o court could find that Texas had acted contrary to federal law as explained by the Supreme Court, and no benefit will arise from further consideration of the obvious." Id.; see also Woods, 307 F.3d at 360.[19]

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19. Haynes also argues that a Texas statute, TEX. CRIM. PRO. art. 44.251, requires the Court of Criminal Appeals (continued...)

No clearly established Supreme Court law creates a right to independent review of mitigating factors on direct or collateral review. See Beazley, 242 F.3d at 260; Hughes, 191 F.3d at 623.[20] The state court' s rejection of this claim withstands AEDPA review. See 28 U.S.C. § 2254(d)(1). The court **DENIES** this claim.

I. Insufficient Evidence of Haynes' Future Danger to Society (Claim 15)

Haynes argues that the evidence insufficiently supported the jury's answer to the future-dangerousness special issue. The trial court instructed the jury to answer the following question:

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Anthony Cardell Haynes, would commit criminal acts of violence that would constitute a continuing threat to society?

Trans. at 458. Haynes argues that given his mitigation evidence and the weak aggravating evidence against him no rational jury would have

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19. (...continued)
to perform an appellate mitigation review. "[T]he proper interpretation of state law is not cognizable in federal habeas proceedings." Beazley, 242 F.3d at 261 (refusing to consider whether TEX. CRIM. PRO. art. 44.251 implicated federal constitutional concerns).

20. In addition, Haynes' meaningful-appellate-review claim anticipates the creation of a new rule that would violate Teague's non-retroactivity principle. See Woods, 307 F. 3d at 360; Beazley, 242 F.3d at 263.

answered that special issue affirmatively. Haynes portrays the aggravating evidence against him as consisting only of the unadjudicated armed robberies he committed before shooting officer Kincaid, and then asserts that "[g]iven Petitioner' s age and youth at the time of the underlying offense, it is not rational to conclude that he would constitute a continuing threat to society if sentenced to imprisonment for life." (Docket Entry No. 1 at p. 368) The Court of Criminal Appeals on direct appeal, however, reviewed the facts supporting the jury's future-dangerousness verdict much differently:

> On the night of the offense, Haynes committed a string of armed robberies before he murdered Sergeant Kincaid. Under the pretense of asking for directions, Haynes would call a victim over to his vehicle and then point a gun at him, demanding his wallet. In this manner, Haynes approached three victims immediately before killing Sergeant Kincaid. Haynes then fired his gun out of his vehicle while passing the Kincaids. Haynes admitted that he shot Sergeant Kincaid because he was a police officer and, showing no remorse, bragged to friends that he had killed a police officer. Haynes also told people that he should have killed Nancy Kincaid, so that there would have been no witness to the murder. The State also introduced evidence that, a couple of years before this offense, Haynes had assaulted his three-year-old sister, had attempted to kill the family dog, and had been diagnosed with and hospitalized for

> intermittent explosive disorder. While hospitalized, he had threatened to kill the staff and attacked a staff-member with a curtain rod. Finally the State introduced evidence of incidents of violence at school and threats to kill teachers and security officers.

Opinion on Direct Appeal, at 5.[21] The Court of Criminal Appeals denied Haynes' claim as follows:

> We have held that a history of escalating violence, a lack of remorse, and a willingness to commit future crimes evince a continuing threat to society. The State's evidence established that Haynes is a violent man with

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21. The Court of Criminal Appeals has described the review of the future dangerousness issues as follows:

> [W]e first look at the facts of the crime itself. If the offense was shown to be sufficiently cold-blooded or calculated, then the facts of the offense alone may support a finding that the defendant will pose a continuing threat to society. If, however, the facts of the case were not sufficiently compelling, we look for other evidence to support the jury's finding, such as psychiatric evidence, character evidence, prior criminal record, prior extraneous offenses, and possible mitigating factors such as the defendant's youth or state of mind at the time of the offense.

Kunkle, 771 S.W.2d at 449; see also Johnson v. Texas, 509 U.S. 350, 371 (1993) (noting Texas's reliance on eight factors to determine the sufficiency of evidence supporting a jury's future-dangerousness decision) (citing Ellason v. State, 815 S.W.2d 656, 660 (Tex. Crim. App. 1991)).

> an explosive temper whose only regret was not murdering Mrs. Kincaid also. A rational jury could find that Haynes presents a continuing threat to society.

Opinion on Direct Appeal, at 5-6 (footnote omitted).

Haynes approaches the evidence presented against him without considering it in a light most favorable to the prosecution. The prosecution not only presented evidence of the officer's death as the culmination of a night of violence, but presented evidence showing an escalating pattern of aggression that increasingly endangered others. In a light most favorable to the prosecution, the jury could rationally find that the confluence of Haynes' brutal crime with his periodic violence, needless aggression, and remorselessness rendered him a societal threat. Haynes does not meet the exacting standards required to merit relief on a habeas insufficiency-of-the-evidence claim. See 28 U.S.C. § 2254(d). The court **DENIES** this claim.

J. The Trial Court Showed Impermissible Bias (Claims 16 and 21)

Haynes alleges that the trial court possessed a biased disposition that made his trial fundamentally unfair.[22] Haynes complains about several incidents in

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22. Respondent incorrectly argues that Haynes completely neglected to exhaust claim 21 in state court. As discussed in the text that follows above, Haynes' state proceedings only raised some of the allegations presented in his habeas petition. Haynes, however, unquestionably exhausted some portion of his twenty-first claim in state court. The court notes that respondent fails to brief the merits of

(continued...)

which he feels the trial court displayed an impermissible bias, including: (1) when the trial court threatened to expel defense counsel from closing arguments, (2) failing to stop the prosecution's alleged improper questioning of the victim's widow, (3) allowing the admission of gruesome photographs, (4) permitting a co-defendant to testify without counsel present, (5) allowing hearsay testimony to come before the jury, and (6) denying his motion for a new trial. Of those circumstances, however, Haynes only exhausted in state court the allegations relating to closing arguments. Since Haynes makes no procedural showing that federal review is available for the remainder of his allegations, this court will only consider the exhausted portion of his claim. The court notes, however, that nothing in the record indicates that the trial court was biased against Haynes.

Haynes' claim focuses on an exchange that followed trial counsel's objections to how the prosecution personalized the case before the jury, which this court has already addressed in claim 6. After the trial court overruled Haynes' objection about prosecutorial argument, the prosecutor asked for more time for his closing argument due to that expended in resolving Haynes' objections. The following exchange then occurred:

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22. (...continued)
either Haynes' sixteenth or twenty-first claim in the answer. This court, however, accepts respondent's general statement that Haynes fails to meet the AEDPA standard with respect to all his claims to allow adjudication of these two deficiently briefed claims.

Trial counsel:	Your Honor, I'm going to object to his sidebar remarks.
Trial court:	Have a seat. Have a seat. Have a seat.
Trial counsel:	Your Honor, can I have a ruling on my objection.
Trial court:	I said sit down, Mr. Nunnery.
Trial counsel:	Your Honor, I'm required by law to ask for a ruling for objection.
Trial court:	You have one second to sit down or I'll remove you from the courtroom. Do we understand each other?

Tr. Vol. 30 at 18-19.[23] Trial counsel made no further objections during the prosecution's closing argument.

After the end of closing arguments, trial counsel stated that he would have made additional objections during the prosecution's closing arguments "but for the Court's admonition that if I stood again you would have me removed from the court. And in that manner I believe that I was not permitted to render a Sixth Amendment effective assistance of counsel to my client with respect to that argument." Tr. Vol. 30 at 67. The trial court then clarified its intent in asking counsel to sit down:

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23. Trial court previously admonished the parties to discontinue side bar comments. See Tr. Vol. 23 at 91-92; Vol. 27 at 14. By closing arguments, the trial court had already threatened the parties with sanctions if they continued making improper comments. See Tr. Vol. 23 at 91-92.

> Let the record reflect that at no time was counsel ordered not to stand and make an objection. The ruling of the Court at that time was for counsel to sit down at that time with regard to that particular confrontation or objection that he had and in no way did the Court ever instruct counsel that he was not able to effectively represent his client by making objections. And counsel's interpretation of that is for counsel's purposes only.

Tr. Vol. 30 at 67.

Haynes filed a motion for a new trial based, in part, on his allegation that the trial court chilled his ability to raise effective objections by asking him to sit down. The trial court held a hearing on that claim. Trial counsel testified about how he felt that the trial court's comment inhibited his ability to object at the punishment phase. Of particular interest, the trial court reemphasized that he "never told Mr. Nunnery to remain silent. [He] told Mr. Nunnery to take his seat [.]" Tr. Vol. 33 at 40. The trial court denied Haynes' motion for a new trial.

On direct appeal Haynes complained that the trial court's actions impaired his right to counsel, indicated that the trial court took up the role as an advocate for the prosecution, and prevented trial counsel from objecting. The Texas Court of Criminal Appeals found that the trial court did not display any improper judicial bias in telling trial counsel to sit down:

The record does not support Haynes's allegation of judicial bias. The harsher effects of the court's ruling were inadvertent. Haynes does not allege a pattern of intrusion with defense counsel's ability to make decisions, and we find no such pattern. Most importantly, we find no evidence that counsel was in fact denied the opportunity to object to improper argument. Mr. Nunnery asserted at the hearing on his motion for a new trial:

> What I am saying there weren't things there that I thought so glaring that it might make any difference on appeal. . . . I did not see any glaring mischaracterization of evidence on your part so all I am simply saying is that I may have raised some objections at that time but they may not have been the type when I walked out of there and talked to the appellate lawyer and say look at Mr. Smyth's argument. I didn't see any of that at all in your arguments.

And when asked directly, Mr. Nunnery claimed no objectionable argument was actually found in the record.

> Smyth: Even with twenty-twenty hindsight and reading the printed argument of Mr. Smyth, there was really nothing objectionable in that, particular argument?

> Nunnery: In my opinion, again, nothing that I would say was so glaring that it was absolutely essential.
>
> Counsel's failure to identify any arguments so egregious that his objection would have required reversal or at least an instruction to disregard confirms our conclusion that the State made no such arguments. We cannot hold that Haynes was denied the opportunity to raise objections when the record reveals that there were in fact no objections to be made.

Opinion on Direct Appeal, at 21-22. Haynes must show that this adjudication was contrary to or an unreasonable application of federal law. See 28 U.S.C. § 2254(d)(1).

The Constitution promises through the operation of due process that an impartial judge will preside over trial proceedings. See Republican Party of Minnesota v. White, 536 U.S. 765, 775-76 (2002); Johnson v. Mississippi, 403 U.S. 212, 216 (1971); In re Murchison, 349 U.S. 133, 136 (1955). Due process requires "the lack of bias for or against any *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." White, 536 U.S. at 776. Most challenges to a judge's impartiality do not raise a constitutional concern "because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform

standard." Bracy v. Gramley, 520 U.S. 899, 904 (1997); Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."); Turney v. State of Ohio, 273 U.S. 510, 523 (1927) ("All questions of judicial qualification may not involve constitutional validity."). "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy, 520 U.S. at 904-05 (quotation omitted); Bigby v. Dretke, 402 F.3d 551, 558 (5th Cir.) ("Stated succinctly, the cornerstone of the American judicial system is the right to a fair and impartial process."), cert. denied, __ U.S. __, 126 S. Ct. 239 (2005).

The record does not indicate that the Court of Criminal Appeals erred in finding no bias on the trial judge's part. In state court, Haynes only highlighted one isolated episode in which he accused the trial judge of being partial.[24] Even that incident does not necessarily display partiality, but possibly frustration. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Liteky v. United States, 510 U.S. 540, 555 (1994). "*Not* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women

24. Even now, most of Haynes' allegations against the trial judge focus on his legal rulings. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994).

. . . sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." Id. at 555-56. Haynes has not shown that the trial court adopted an attitude that rendered his trial fundamentally unfair. Haynes fails to show that the AEDPA would allow relief with respect to this claim. The court **DENIES** this claim.

K. Admission of Victim Impact Testimony (Claim 17)

Over the defense's objection, the trial court allowed the victim's wife to testify in the punishment phase regarding her relationship with her husband, his character, and the grief that she and her family felt at his death. Haynes argues that Mrs. Kincaid's testimony went beyond showing her husband's uniqueness as a human being and forced the jury to enter into a comparative judgment about the worth of his life and the victim's. Haynes argues that the introduction of Mrs. Kincaid's testimony violated both the Eighth and Fourteenth Amendments.[25]

If a State "chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject , the Eighth Amendment erects no *per se* bar." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

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25. Haynes did not exhaust this precise claim in state court. On state habeas review, however, he raised a claim that trial counsel should have sought a limiting instruction with respect to the victim impact testimony. Haynes' presentation of this claim with a new legal foundation on federal review likely renders it unexhausted.

Texas allows the introduction of victim-impact testimony, so long as it is relevant. See Ford v. State, 919 S.W.2d 107, 114 (Tex. Crim. App. 1996). The Supreme Court has elaborated that a State may conclude that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." Payne, 501 U.S. at 827. The Supreme Court has reasoned "that victim impact evidence did not overstep the bounds of the Fourteenth Amendment unless the evidence introduced 'is so unduly prejudicial that it renders the trial fundamentally unfair.'" Black v. Collins, 962 F. 2d 394, 408 (5th Cir. 1992) (quoting Payne, 501 U.S. at 825). The Supreme Court recognized that a state has a

> legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

Payne, 501 U.S. at 825 (quotation omitted). The Payne Court noted that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 501 U.S. at 825.

Relying heavily on the dissenting opinion in Payne, Haynes argues that the Supreme Court wrongly

decided that case and that a trial court should never allow victim impact testimony to come before the jury. Reversing Payne is beyond this court's authority or power; this court must follow Payne's holding. The Eighth Amendment, therefore, erected no barrier to the admission of Mrs. Kincaid's testimony about her husband.

Undeterred, Haynes also argues that the highly inflammatory nature of Mrs. Haynes' testimony violated his rights under the Due Process Clause. Haynes contends that Texas Rule of Criminal Evidence 403, which allows for the exclusion of evidence when unfair prejudice outweighs the probative nature of proposed testimony, should have prevented the introduction of Mrs. Kincaid's testimony. This court's role on habeas is not to review the application of state law. See Young v. Dretke, 356 F.3d 616, 628 (5th Cir. 2004) ("[I]n our role as a federal habeas court, we cannot review the correctness of the state habeas court's interpretation of state law."). Federal law explicitly prevents granting habeas relief based on error in the application of state law. See 28 U.S.C. § 2254(a) (cabining federal relief to a "violation of the Constitution or laws or treaties of the United States"). Whether or not Texas correctly applied its evidentiary law to allow Mrs. Kincaid's testimony is a question beyond the scope of federal habeas review.

Mrs. Kincaid's brief testimony was not the only evidence that would have influenced the jury to impose a death sentence. The needless manner of the killing, Haynes' remorselessness, and his past history of escalating violence by far overshadowed Mrs. Kincaid's

statements. Cf. Payne, 501 U.S. at 832 ("[S]urely this brief statement did not inflame [the jury's] passions more than did the facts of the crime [ ]") (O'Connor, J., concurring). The challenged testimony only reminded the jury that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique death to society." Id. at 825. The trial court instructed the jury not to let "sentiment, conjecture, sympathy, passion, public opinion or public feeling" influence their answers to the special issues, Trans. at 451, 453, and thus sufficiently removed the possibility that Mrs. Kincaid's testimony would unduly prejudice the verdict. See Bernard, 299 F.3d at 481 (finding that a similar instruction removed any taint from victim-impact testimony). Mrs. Kincaid's testimony was not inherently inflammatory or unduly prejudicial. See Westley v. Johnson, 83 F.3d 714, 722 (5th Cir. 1996) (finding victim's wife's testimony about his good deeds and prosecutorial argument about the impact on his family to be proper); Ward v. Whitley, 21 F.3d 1355, 1364 (5th Cir. 1994) (finding testimony that victim was a good provider to be permissible); Black, 962 F.2d at 408 (finding testimony concerning character and impact of victim's loss on family members to be permissible).[26] Haynes has not shown

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26. The testimony in this case was no more inflammatory than that in Payne. See Payne, 501 U.S. at 814-15. In Payne the defendant slaughtered a mother and her two-year old daughter with a butcher knife while her three-year old son looked on. At trial the grandmother of the boy testified that "[the son] cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his

(continued...)

that the state-court decision was contrary to, or an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1). This court **DENIES** Haynes' victim-impact-testimony claim.

VI. Certificate of Appealability

Haynes has not yet requested that this court grant him a Certificate of Appealability ("COA"), although this court can consider the issue sua sponte. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000). Under the AEDPA a prisoner cannot seek appellate review from a lower court's judgment without receiving a COA. 28 U.S.C. § 2253(c). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." Slack v. McDaniel, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is

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26. (...continued)
sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." Id. The prosecution then elaborated on the impact of the murder during closing arguments. The Supreme Court found that those statements did not violate the Constitution. The testimony in the instant case was no more inflammatory or prejudicial than the heart-wrenching testimony in Payne.

straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484; Miller-El, 537 U.S. at 336-38. On the other hand, a district court that has denied a habeas petition on procedural grounds should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484; Miller-El, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." Slack, 529 U.S. at 484.

Under the appropriate standard the court finds that Haynes has not shown that this court should certify any issue for appellate consideration. This court **DENIES** Haynes a COA on all the claims raised by his petition.

VII. Conclusion

For the reasons described above, the court finds that Haynes has not shown entitlement to federal habeas relief. Accordingly, the court **DENIES** Haynes' petition and will dismiss this action with prejudice, with the exception of Haynes' lethal-injection challenge, which this court will dismiss without prejudice. Haynes' Motion to Hold Proceedings in Abeyance to Allow Petitioner to Exhaust Claims in State Court (Docket Entry No. 16) is **DENIED**. No Certificate of Appealability will issue.

SIGNED at Houston, Texas, on this 25th day of January, 2007.

/s/
SIM LAKE
UNITED STATES DISTRICT JUDGE

[FILED
Charles Bacarisse
District Clerk
AUG 03 2004
Time: _____
Harris County, Texas
By_____
Deputy]

Cause No. 783872-A

EX PARTE	§	IN THE 263rd DISTRICT COURT
	§	OF
ANTHONY CARDELL HAYNES, Applicant	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus; the Respondent's Original Answer; the affidavits of Robert Jones and Alvin Nunnery; and official court documents and records in cause number 783872 and 783872-A; makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On September 24, 1999, the applicant, Anthony Cardell Haynes, was convicted for the felony offense of capital murder, cause number 783872, in the 263rd District Court of Harris County, Texas. On September 22,1999, the jury answered in the affirmative to the first special issue and in the negative to the second special issue, and the trial court assessed punishment at death (C.R. at 449,458-9,477).

2. On October 10, 2001, the Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion. *Haynes v. State*, No. 73,685 (Tex. Crim. App. October 10, 2001)(not designated for publication).

First Ground – mitigation special issue:

3. The Court finds, based on the trial record, that the trial court overruled the applicant's motion to hold Sections 2(e) and 2(f), TEX. CODE CRIM. PROC. ANN. art. 37.071, unconstitutional on the basis that the statute was not specific regarding the burden of proof; that the jury was given no meaningful guidance in deciding the special issues; that the death penalty was imposed in a "wanton and freakish manner;" and, that the statue violated U.S. Const. amends. VIII and XIV (C.R. at 150-3; II R.R. at 5-12).

4. The Court finds, based on the Court of Criminal Appeals direct appeal opinion, that the applicant did not challenge Texas' death penalty sentencing statute on direct appeal on the basis that it violated the Eighth Amendment because it omitted a burden of proof on the mitigation special issue and because it was

incapable of meaningful appellate review. *Haynes v. State*, No. 73,685 (Tex. Crim. App. October 10, 2001) (not designated for publication).

5. The Court finds that the Court of Criminal Appeals has held that a post-conviction writ of habeas corpus should not be used as a substitute for direct appeal. *Ex parte Nelson, Jr.*, No. 74, 818 (Tex. Crim. App. June 23, 2004)(not yet published); *Ex parte Townsend*, No. 74,764 (Tex. Crim. App. June 16,2004).

6. The Court finds that the Court of Criminal Appeals has held that the mitigation special issue is not unconstitutional as a violation of the Eighth Amendment because it omits a burden of proof requirement. *Hankins v. State*, 132 S.W.3d 380, 384 (Tex. Crim. App. 2004); 121 S.W.3d 748, 767 (Tex. Crim. App. 2003); *Valle v. State*, 109 S.W.3d 500, 504 (Tex. Crim. App. 2003); *Jackson v. State*, 33 S.W.3d 828, 840-1 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 1068, 121 S.Ct. 2221, 150 L.Ed2d 213 (2001); *see also Barnes v. State*, 876 S.W.2d 316, 330 (Tex. Crim. App. 1994)(Eighth and Fourteenth Amendments do not require that a burden be placed on the State regarding mitigating evidence).

7. The Court finds that the Court of Criminal Appeals has also held that the mitigation special issue does not violate the Eighth Amendment on the basis that meaningful appellate review of the jury's determination is impossible. *Resendiz v. State*, 112 S.W.3d 541, 549 (Tex. Crim. App. 2003); *Prystash v. State*, 3 S.W.3d 522, 535-6 (Tex. Crim. App. 1999).

8. The Court finds that the Court of Criminal Appeals has held that no appellate sufficiency review of the mitigation issue is required under TEX. CODE CRIM. PROC. ANN. art. 44.251. *Tong v. State*, 25 S.W.3d 707 (Tex. Crim. App. 2000); *McFarland v. State*, 928 S.W.2d 482, 498-9 (Tex. Crim. App. 1996).

Second Ground – jury charge:

9. The Court finds, based on the trial record, that the applicant did not object at the trial level on the basis that the jury was not instructed that a life sentence would result if the jury was unable to answer a special issue.

10. The Court finds, based on the trial record, that trial counsel Alvin Nunnery informed the jury of the effect of its failure to agree to the answers to the special issues during punishment argument:

> But the law says, ladies and gentlemen, that you must weigh individually over the evidence and you must make the decision that you individually think is the appropriate one. And to that extent the law talks about unanimity. It takes ten not to do this and ten not to do that. But the bottom line is that the law does not require you to deliberate and deliberate until you get ten or deliberate until you get 12. But what the law requires you to do is to return to court in a manner and in such a way that your position is respected and recognized. I cannot tell you the result of the failure to agree but all I can do is tell you this, even if you don't agree he still either gets life

> or death. That does not change. There is no retrial. He either gets life or death based upon your finding of guilt in this case.

(XXX R.R. at 32-33)

11. The Court finds that TEX. CODE CRIM. PRO. ANN. art. 37.071, §2(a) prohibits the trial court and attorneys from informing a juror or prospective juror of the effect of the jury's failure to agree on a special issue.

12. The Court finds that the Court of Criminal Appeals has repeatedly held that preventing a jury from knowing the effect of its answers to the punishment issues does not subject a defendant to cruel and unusual punishment under the Eighth Amendment. *Rousseau v. State*, 855 S.W.2d 666, 687 (Tex. Crim. App. 1993); *see also Davis v. State*, 782 S.W.2d 211, 221 (Tex. Crim. App. 1989), *cert. denied*, 495 US. 940 (1990) (informing jury of the effect of its answers would encroach upon the jury's fact-finding function and would be an "open invitation for the jury to avoid its responsibility and to disagree.").

Third Ground – trial counsel:

13. The Court finds, based on the trial record, that the trial court appointed Robert Jones and Alvin Nunnery to represent the applicant in his capital murder trial (I C.R. at 5, 125).

APPLICANT'S FAILURE TO TESTIFY

14. The Court finds, based on the trial record, that in the applicant's oral confession to the police regarding the instant offense, the applicant admitted that he shot

the complainant and believed the complainant when the complainant identified himself as a police officer (*State's Ex. 1H; State's Ex. 2H*).

15. The Court finds, based on the trial record, that evidence was elicited at the guilt- innocence phase of the applicant's capital murder trial that the complainant, a Houston Police Department ("HPD") officer, was off-duty when the applicant shot out the complainant's windshield; that the complainant identified himself as a police officer and was reaching for a badge when the applicant shot him; that HPD policy requires both on-duty and off-duty police officers to take prompt and effective police action for any violations of the law committed in their presence; that an off-duty officer is considered to be discharging his official duty when he takes such action; that an HPD officer would be duty bound to investigate if he saw someone throw something from a moving vehicle that broke the windshield of another vehicle; and, that the complainant was performing official police action and was considered on duty when he stopped the applicant (XXIII R.R. at 60-8, 118-9; XXV R.R. at 37).

16. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery that trial counsel thoroughly advised the applicant of the potential risks and benefits of testifying during his capital murder trial; that trial counsel wanted the applicant to testify during the suppression hearing, but the applicant indicated that he was too nervous to testify; that the applicant's fear of testifying increased after the jury was impaneled; that the applicant decided not to testify during his capital murder trial;

that trial counsels' assessment of the instant case lead them to the conclusion that it was best that the applicant not testify during the applicant's capital murder trial; that the applicant agreed with trial counsels' recommendation that it was best that the applicant not testify, and the applicant never suggested that he wished to testify; that trial counsel believed that the facts of the case negated the element of the applicant's knowledge of his victim's status; and, that trial counsel believed that the jury could have concluded that the applicant's self-defense claim was contrived at the last minute because the applicant's alleged defenses were not included in his confession. *Respondent's Original Answer, Exhibits A and B, affidavits of trial counsel Robert Jones and Alvin Nunnery, respectively.*

17. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery, that the applicant decided not to testify during his capital murder trial, and the applicant's decision not to testify was a voluntary and informed decision, intelligently made, with full knowledge of circumstances, options and consequences. *Jackson v. State*, 766 S.W.2d 504, 509 (Tex. Crim. App. 1985).

18. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery, that the applicant agreed to trial counsels' recommendation that the applicant not testify during his capital murder trial.

VICTIM-IMPACT TESTIMONY

19. During the punishment phase of trial, the State elicited testimony that the applicant robbed Chris Dicken of his billfold at gunpoint and tried to rob another man of his wallet prior to committing the instant offense; that the applicant assaulted his three-year-old sister and tried to kill the family dog in 1996; that the applicant acted violently and threatened to kill hospital staff at West Oaks Hospital in 1996; and, that the applicant displayed violent behavior at school and threatened to kill a police officer who was summoned to escort the applicant from school (XXVIII R.R. at 17-20, 32-9, 48-54, 116-120, 147).

20. At punishment, the defense elicited evidence regarding the applicant's spiritualism and church attendance; that the applicant was accepted to Morehouse College; that the applicant was scared and remorseful after the instant offense; that the applicant was amiable and never in conflict with other jail inmates; that the applicant was a moral and model child who obeyed his parents; that the applicant was intelligent and made good grades; that the applicant earned many achievement awards and was never violent; that the applicant's father was active in the applicant's life; that the applicant was in ROTC in high school and received scholarships; that the applicant received therapy and counseling for several weeks at West Oaks Hospital; and, that, after an incident during the applicant's high school senior year when the applicant's father slapped the applicant in the face, the applicant's father found the applicant sitting in the living room holding a nine-millimeter service weapon

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and crying, "Dad, something bad is happening. I have bad thoughts" (XXVIII R.R. at 160-6; XXIX R.R. at 28, 39, 54, 67, 70-2, 85, 90, 94-5).

21. On rebuttal at punishment, the complainant's widow, Nancy Kincaid, testified for the State that everyone liked the complainant; that the complainant helped people out; and, that the complainant was very handy. When the State asked Nancy Kincaid whether the complainant was a kind person, defense counsel objected that the State's question was improper because it pertained to the complainant's character. The trial court sustained the objection and instructed the jury to disregard the question. The State then asked Nancy Kincaid about the complainant's relationship with his two daughters and the effect of the complainant's death on his two daughters and witness Nancy Kincaid. Nancy Kincaid testified that the complainant spent a lot of time with his daughters and helped them with sports; that the complainant's younger daughter cried and had temper tantrums and stomachaches after the complainant's death; that the complainant's older daughter was very close to the complainant and was devastated by his death; that the older daughter cried every night for months; that Nancy Kincaid had depended on the complainant who was the major decision-maker in the family; and, that Nancy Kincaid missed the complainant (XXIX R.R. at 127-130).

22. The Court finds, based on the trial record, that trial counsel not request that the trial court instruct the jury that victim impact testimony could only be considered with respect to the mitigation special issue.

23. The Court finds that, in the absence of a request for a limiting instruction, the trial court's action in admitting evidence without limitation shall not be a ground for complaint on appeal. TEX. R. EVID. 105(a).

24. The Court further finds that a trial court's refusal to give a limiting instruction, upon a proper request, is non-constitutional error subject to a harmless error analysis pursuant to TEX. R. APP. P. 44.2(b); *Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997); *see also Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002)(Texas and federal courts have confined the scope of post-conviction writs of habeas corpus to jurisdictional or fundamental defects and constitutional claims); *McCain v. State*, 67 S.W.3d 204, 209 (Tex. Crim. App. 2002)(procedural errors or statutory violations are not fundament or constitutional errors that require relief on a writ of habeas corpus).

25. The Court finds that the Court of Criminal Appeals has held that "victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence." *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 550 (1999).

26. The Court further finds that the Court of Criminal Appeals has also held that victim impact evidence consists of evidence "concerning the effect that the victim's death will have on others, particularly the

victim's family members." *Mathis v. State*, 67 S.W.3d 918, 928 (Tex. Crim. App. 2002(*quoting Mosley*, 983 S.W.2d at 261)).

27. The Court finds, based on the applicant's habeas petition, that the applicant fails to cite authority supporting his ground for relief that the applicant was entitled to a limiting instruction that the victim impact evidence could be considered solely with respect to the mitigation special issue and that trial counsel were ineffective for failing to request such instruction.

28. The Court finds, based on the trial record and the applicant's habeas application, that the applicant fails to demonstrate that he was harmed by trial counsels' failure to request a limiting instruction that the victim impact evidence could be considered solely with respect to the mitigation special issue.

29. The Court finds that the applicant fails to demonstrate that the jury considered the victim-impact testimony in a context other than the mitigation special issue.

Fourth Ground – State's punishment argument:

30. The Court finds, based on the trial record, that evidence was elicited during the applicant's trial that the applicant had approached people under the pretext of asking for directions merely to get close enough to rob them (XXVIII R.R. at.18-19, 35-39).

31. The Court finds, based on the trial record, that the State argued the following at punishment:

> But let's just look at May the 22, 1998, before Sergeant Kincaid was merciless[ly] killed. The

> defendant goes up. It's his ideal [sic]. He listens to the tape. He wants to get some gas money. Gas money for his truck. He could have asked his mom, he could have asked his dad. He'd rather steal. He'd rather take it from somebody else. He goes to some unknown person in a parking lot at Willowbrook Mall, hey, buddy, can you give me directions to so and so. The guy starts giving him directions. I'll bet the next time somebody comes or hollers at you to give directions you are going to think about him, look at him. He looks so innocent he couldn't hurt anybody. And that is what those three people that night thought.
>
> And before you ever walk up to another car – I know I would. I'm not going to walk up. I'm going to step back and maybe I'll tell them the directions but I'm not going –

Trial counsel objected that the State's argument was improper because the prosecutor was giving his opinion. The court sustained the defense's objection, instructed the jury to disregard the State's argument, and denied the defense's motion for a mistrial. The State then argued, "You know your whole life is going to change because of this trial. You know—" Trial counsel objected to the State's argument and requested a ruling on the objection. The trial court judge ordered trial counsel to sit down without ruling on the objection, and the State continued with closing argument (XXX R.R. at 14-19).

32. The Court finds, based on the trial record, that trial counsel lodged no further objections to the State's

punishment argument, including the state's argument that "you and I both know that Kent Kincaid would be alive today if he hadn't uttered those fateful words" (XXX R.R. at 22).

33. The Court finds, based on the trial record, that trial counsel testified during the hearing on the applicant's motion for new trial that he made no further objections to the State's closing punishment argument, and that there was nothing so objectionable in the remainder of the State's argument that it was essential for trial counsel to object (XXXIV R.R. at 43).

34. The Court finds that, on direct appeal of the instant conviction, the Court of Criminal Appeals overruled the applicant's point of error that the applicant was denied a fair trial based upon the judge silencing trial counsel's objections to the State's punishment arguments by ordering trial counsel to sit down and threatening to have counsel removed from the courtroom. The Court of Criminal Appeals held that trial counsel was not denied the opportunity to object to allegedly improper arguments because the State made no objectionable arguments following the judge's instruction to trial counsel to sit down. *Haynes v. State*, No. 73,685, slips op. at 19-22 (Tex. Crim. App. Oct. 10, 2001).

35. The Court finds that the Court of Criminal Appeals has held that a defendant forfeits his right to complain about jury argument on direct appeal if the defendant fails to object to the allegedly improper argument at the trial level. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

36. The Court finds that the Court of Criminal Appeal has held that there are four permissible areas of jury argument: summation of the evidence, reasonable deductions from the evidence, an answer to an argument by opposing counsel, or a plea for law enforcement. *Hughes v. State*, 878 S.W.2d 142,157-158 (Tex. Crim. App. 1992) (op. on rehearing), *cert. denied*, 511 U.S. 1152 (1994); *Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App.), *cert. denied*, 506 U.S. 839 (1992).

37. The Court finds that the Court of Criminal Appeals has held that a prosecutor may argue his opinions concerning issues in the case provided the opinions are based on the evidence in the record and do not constitute unsworn testimony." *McKay v. State*, 707 S.W.2d 23,37 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 871 (1986).

CONCLUSIONS OF LAW

First Ground – mitigation special issue:

1. Because the applicant did not challenge Texas' death penalty sentencing statute on direct appeal on the basis that it violated the Eighth Amendment because it omitted a burden of proof on the mitigation special issue and because it was incapable of meaningful appellate review, the applicant's first ground for relief alleging error on such basis need not be considered in the instant habeas proceeding or any subsequent proceeding. *Ex parte Nelson, Jr.*, No. 74, 818 (Tex. Crim. App. June 23, 2004)(not yet published); *Ex parte Townsend*, No. 74,764 (Tex. Crim. App. June 16,2004).

2. Alternatively, the applicant fails to show (a) that his constitutional rights were violated based on the lack of a burden of proof in the mitigation issue; (b) that the lack of such burden of proof prevents meaningful appellate review; (c) and that TEX. CODE CRIM. PROC. ANN. art. 44.251 requires a sufficiency review of a negative answer to the mitigation special issue. *See Jackson v. State*, 33 S.W.3d 828, 840-1 (Tex. Crim. App. 2000)(rejecting claim of alleged statutory infirmity when TEX. CODE CRIM. PROC. ANN. art. 44.251 is considered in conjunction with art. 37.071); *Resendiz v. State*, 112 S.W.3d 541, 549-50 (Tex. Crim. App. 2003)(affirming that mitigation issue is constitutionally sound regardless of lack of burden of proof and rejecting contention that lack of burden of proof in mitigation issue prevents meaningful appellate review statutory prohibition of informing).

Second Ground – jury charge:

3. Based on the applicant's lack of objection to the trial court's failure to instruct the jury that a life sentence would result if the jury was unable to answer a special issue, the applicant is procedurally barred from advancing his habeas ground for relief claiming error on such basis. *Hodge v. State*, 631 S.W.2d 754,757 (Tex. Crim. App. 1978).

4. In the alternative, the trial court properly did not instruct the jury as to the result of their failure to agree on a special issue. TEX. CODE CRIM. PRO. ANN. art. 37.071, §2(a).

Third Ground – trial counsel:

5. The applicant fails to show deficient performance, much less harm, with respect to the following allegations: that trial counsel prevented the applicant from testifying and presenting alleged defenses and that trial counsel failed to request a limiting instruction on victim impact evidence. *Strickland v. Washington*, 466 U.S. 668 (1984); *see Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981)(holding that fact that another attorney might have pursued different strategy will not support finding of ineffectiveness of counsel).

6. Additionally, trial counsel were not ineffective with respect to the applicant's decision not to testify during his capital murder trial when the applicant's decision was a voluntary and informed decision, intelligently made, with full knowledge of the circumstances, options, and consequences. *Jackson v. State*, 766 S.W.2d 504, 509 (Tex. Crim. App. 1985).

7. Additionally, trial counsel were not ineffective with respect to the applicant's decision not to testify during the applicant's capital murder trial when trial counsel thoroughly advised the applicant of his right to testify and the applicant agreed with trial counsels' assessment that it was best that the applicant not testify. *See Duncan v. State*, 717 S.W.2d 345, 348 (Tex. Crim. App. 1986)(holding that the reasonableness of counsel's actions may be determined or substantially influenced by the informed strategic choices of a defendant).

8. Additionally, the applicant fails to demonstrate that he was prejudiced by trial counsels' alleged ineffectiveness with respect to not calling the applicant to testify during the applicant's capital murder trial.

9. Additionally, because the applicant fails to cite authority supporting his ground for relief that the applicant was entitled to a limiting instruction that the victim impact evidence could be considered solely with respect to the mitigation special issue and that trial counsel were ineffective for failing to request such instruction, the applicant's ground for relief is not properly before this Court for review. *Granger v. State*, 850 S.W.2d 513, 515, n.6 (Tex. Crim. App. 1993); *McFarland v. State*, 845 S.W.2d 824, 848-49 (Tex. Crim. App. 1992).

Fourth Ground – State's punishment argument:

10. Because the applicant failed to object at the trial level when the State asserted during jury argument at punishment, "And you and I both know that Kent Kincaid would be alive today if he hadn't uttered those fateful words," the applicant is procedurally barred from advancing his ground for relief. *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

11. Alternatively, because the Court of Criminal Appeals held on direct appeal of the instant cause that there were no objectionable punishment arguments by the State following the trial court's instruction to defense counsel to be seated, the applicant's fourth ground for relief alleging improper punishment argument by the State need not be considered in the instant habeas proceeding or any subsequent

proceeding. *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

12. Alternatively, the State's punishment argument that "you and I both know that Kent Kincaid would be alive today if he hadn't uttered those fateful words" argument was proper as a reasonable deduction from the evidence and plea for law enforcement. *See Finding of Fact 32.*

13. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 783872-A

EX PARTE	§	IN THE 263rd DISTRICT COURT
	§	OF
ANTHONY CARDELL HAYNES, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 783872-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 783872-A, including his application for writ of habeas corpus;

2. all of the Respondent's pleadings filed in cause number 783872-A, including the Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and the order in cause number 783872-A;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 783872-A;

5. all affidavits and exhibits filed in cause no. 783872-A;

6. the affidavits of Robert Jones and Alvin Nunnery;

7. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 783872, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Dick Wheelan; 440 Louisiana, St. 900; Houston, Texas 77002 and to Respondent: Lynn Hardaway; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 783872-A.

SIGNED this ____ day of AUG 05 2004, 2004.

/s/

Presiding Judge
263rd District Court

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 59,929-01

EX PARTE ANTHONY CARDELL HAYNES

ON APPLICATION FOR WRIT OF HABEAS CORPUS

FROM HARRIS COUNTY

Per Curiam.

O R D E R

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 1 1.07 1, Tex. Code Crim. Proc.

On September 24, 1999, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Haynes v. State*, No. 73,685. slip op. (Tex. Crim. App. Oct. 10, 2001)(not designated for publication).

Applicant presents four allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial judge entered findings of fact and conclusions of law, and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions, with the exception of Conclusion of Law number 11. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 6TH DAY OF OCTOBER, 2004.
Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,685

ANTHONY CARDELL HAYNES, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM HARRIS COUNTY

Keasler, J., *delivered the opinion of the Court which* Keller, P.J., *and* Meyers, Price, Womack, Hervey, Holcomb, *and* Cochran, J.J., *joined.* Johnson, J., *concurred in the result.*

OPINION

Anthony Cardell Haynes was convicted in September 1999 of capital murder under Section 19.03(a) of the Texas Penal Code.[1] Pursuant to the jury's answers to the special issues set forth in Article 37.071,§§ 2(b) and 2(e), the trial judge sentenced Haynes to death in accordance with Article 37.071,§ 2(g). Review by this court is automatic under Article 37.071, § 2(h). Haynes claims that the trial judge erred

1. Unless otherwise indicated all future references to sections refer to the Texas Penal Code and references to articles refer to the Texas Code of Criminal Procedure.

in various respects. We find his contentions to be meritless, and we affirm his conviction and sentence.

In his thirty-first point of error, Haynes says that the evidence is legally insufficient to support the jury's verdict that Sergeant Kincaid, the victim, was acting in the lawful discharge of his official duties as a peace officer at the time of his murder.[2] In conducting a legal sufficiency review, we follow the standard prescribed in *Jackson v. Virginia*.[3] We view the evidence in a light most favorable to the verdict, asking whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt.[4] Whether Sergeant Kincaid was on duty was a question of fact for the jury.

The record reflects that on the night of the offense, Sergeant Kincaid and his wife were leaving home in their Jeep Cherokee. They were apparently several blocks outside the Houston city limits when they passed Haynes's vehicle and something hit and cracked the Kincaids' windshield on the driver's side. Sergeant Kincaid turned his vehicle around to investigate the incident, thinking that a rock had been thrown at his windshield. In fact, Haynes had fired a shot at the Kincaids' vehicle. Haynes turned his own vehicle around and parked next to the Kincaids' Jeep.

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2. Sec. 19.03(a)(1).

3. 443 U.S. 307 (1979).

4. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997).

Sergeant Kincaid got out and approached Haynes's truck.

Sergeant Kincaid calmly told Haynes, "You hit my window." Haynes said, "I accidently threw something at your window." Sergeant Kincaid replied, "I am a police officer. Let's talk about it." As he asked to see Haynes's driver's license, Kincaid reached toward his back pocket, presumably for his police identification. At that instant Haynes shot Kincaid. Sergeant Kincaid was declared brain-dead upon arriving at Hermann Hospital. His organs were harvested for transplantation, and he was declared dead shortly after 3:00 a.m. on May 23, 1998. The cause of death was a gunshot wound to the head.

The record establishes that Sergeant Kincaid was a Houston police officer and that he was off-duty at the time of his death. Assistant Police Chief Jeraldine Stewart testified that department policies require both on-duty and off-duty officers to take prompt and effective police action for any violation of the law committed in their presence. According to Stewart, when an off-duty officer takes such action, he is considered to be discharging his official duty. Stewart testified that Houston police officers are authorized to investigate any offense threatening the public safety outside the City of Houston. Stewart testified that she had reviewed the police report and determined that Sergeant Kincaid had been performing an official duty when he stopped Haynes.

A rational juror could have concluded from this evidence that Sergeant Kincaid was acting in the lawful discharge of an official duty when he was killed.[5] Haynes's thirty-first point of error is overruled.

In his thirty-second-point of error, Haynes avers that the evidence is factually insufficient to show that Sergeant Kincaid was in the lawful discharge of his official duty when he was killed. Haynes argues that the evidence establishing that Kincaid was acting as a private motorist, stopping to exchange information with another motorist who had damaged his vehicle, outweighs the evidence establishing that Kincaid was acting as a peace officer in the line of duty.

Under a factual sufficiency review, the verdict may be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.[6] That is not the case here. Haynes's thirty-second point of error is overruled.

In his thirty-third point of error, Haynes says the evidence is legally insufficient to show that he presents

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5. *See Moore v. State*, 999 S.W.2d 385, 404 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex. Crim. App. 1990), *cert. denied*, 500 U.S. 948 (1991), *disavowed on other grounds*, *Madden v. State*, 799 S.W.2d 683, 686 n.3 (Tex. Crim. App. 1990); see also *Selvage v. State*, 680 S.W.2d 17, 21 (Tex. Crim. App.1984), *cert. denied*, 484 U.S. 933 (1987).

6. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

a continuing threat to society.[7] In his thirty-fourth point of error, Haynes argues that he was denied his right to due process because of this insufficiency. In addressing this question, we review all of the evidence in the light most favorable to the verdict. We will uphold it if any rational juror could have found beyond a reasonable doubt that Haynes will probably commit further acts of violence making him a continuing threat to society.[8]

On the night of the offense, Haynes committed a string of armed robberies before he murdered Sergeant Kincaid. Under the pretense of asking for directions, Haynes would call a victim over to his vehicle and then point a gun at him, demanding his wallet. In this manner, Haynes approached three victims immediately before killing Sergeant Kincaid. Haynes then fired his gun out of his vehicle while passing the Kincaids. Haynes admitted that he shot Sergeant Kincaid because he was a police officer and, showing no remorse, bragged to friends that he had killed a police officer. Haynes also told people that he should have killed Nancy Kincaid, so that there would have been no witness to the murder. The State also introduced evidence that, a couple of years before this offense, Haynes had assaulted his three-year-old sister, had attempted to kill the family dog, and had been diagnosed with and hospitalized for intermittent explosive disorder. While hospitalized, he had threatened to kill the staff and attacked a

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7. Art. 37.071, § 2(b)(1).

8. *Wilson v. State*, 7 S.W.3d 136, 142 (Tex. Crim. App. 1999).

staff-member with a curtain rod. Finally, the State introduced evidence of incidents of violence at school and threats to kill teachers and security officers.

We have held that a history of escalating violence, a lack of remorse, and a willingness to commit future crimes evince a continuing threat to society.[9] The State's evidence established that Haynes is a violent man with an explosive temper whose only regret was not murdering Mrs. Kincaid also. A rational jury could find that Haynes presents a continuing threat to society. Haynes's thirty-third and thirty-fourth points of error are overruled.

In his first eight points of error, Haynes complains the trial judge erred in not suppressing his two audio-taped confessions, which he claims were gained as a result of his illegal arrest. Haynes says that his arrest was made without a warrant or probable cause and was, therefore, unreasonable and in violation of the Fourth and Fourteenth Amendments to the federal constitution and Article I, § 9, of the state constitution. Haynes also argues his arrest was illegal under Chapter 14 of the Code of Criminal Procedure and admitted into evidence in violation of Article 38.23. The State responds that Haynes's arrest was legal and reasonable because he committed two traffic violations in the presence of the arresting officer.

Although great weight should be given to the inferences drawn by the trial judge, determinations of

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9. *See, e.g., Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999).

probable cause are reviewed de novo on appeal.[10] At the suppression hearing, Officer Miller testified that Haynes ran "a couple of stop signs" in his presence immediately before his arrest. Section 544.010(a) of the Texas Transportation Code defines this as an offense, and § 543.001 authorizes peace officers to arrest, without a warrant, a person who commits such a violation in his presence. In addition, Article 14.01(b) states that a peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. So Haynes's arrest was authorized by law. An arrest for offenses committed in the presence of an officer, even minor offenses, is constitutionally reasonable.[11] As the State notes, Miller's assertion at the hearing that he did not arrest Haynes for the traffic offense is unimportant. The subjective intent of the arresting officer does not alter the fact that his arrest was authorized by law and reasonable for purposes of the Fourth Amendment.[12] Accordingly, Haynes's first through eighth points of error-are overruled.

In points of error nine through nineteen, Haynes again argues that the trial court errred in overruling his motion to suppress his two confessions. This time,

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10. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim App . 1997)(citing *Ornelas v. United States*, 517 U.S. 690 (1 996)).

11. *See Atwater v.Lago Vista*, ___ U.S.___, 121 S.Ct 1536, 149 L.Ed.2d 549 (2001).

12. *Garcia v. State*, 827 S.W.2d 937, 942-44 (Tex. Crim. App:1992); *Whren v. United States*, 517 U.S. 806 (1996).

he claims the confessions were produced by coercion and are involuntary and inadmissible as a matter of constitutional and statutory law.[13] Haynes contends that his statements were coerced because the police deliberately delayed in taking him to a magistrate. This delay was particularly coercive, he argues, because he was only eighteen, he was tired and hungry, he was not given the chance to use the restroom, and he was not permitted to call his father, an arson investigator with the Houston Fire Department.

Because the issue of voluntariness of the statements turns on the evaluation of Miller's credibility, we apply a deferential abuse of discretion standard in our review of Haynes's voluntariness claim.[14] A statement is involuntary if the record reflects that the State's conduct, when judged from the totality of the circumstances, was of such a coercive nature that the statement obtained thereby was unlikely to have been the product of free and unconstrained choice.[15] The failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal

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13. U.S. CONST. AMENDS. V and XIV; TEX.CONST. Art. I, §§10 and 19; Arts. 38 21 and 38.23.

14. *Garcia v. State*, 15 S.W.3d 533, 535 (Tex. Crim. App. 2000).

15. *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995).

connection between the delay and the confession.[16] In addition, an unreasonable delay in presenting an arrestee before a magistrate will not vitiate an otherwise voluntary confession if the arrestee was properly advised of his *Miranda* rights.[17]

At the hearing on Haynes's motion, Miller's uncontroverted testimony was the only evidence before the trial court. According to Miller, Haynes arrived at the police station at about 11:52 p.m. Miller did not take Haynes to the magistrate because he wanted to first ascertain his involvement, if any, in the aggravated robberies and the capital murder. He removed Haynes's handcuffs and placed him in an interview room. Miller removed his weapon and entered the interview room. Miller advised Haynes that he was a suspect in the robberies and the murder of Sergeant Kincaid and read Haynes his Article 38.22 warnings (satisfying *Miranda*'s requirements). Haynes indicated that he understood his rights but that he did not wish to assert them. Miller and Haynes were alone during the interview which produced Haynes's first statement. Haynes was seated in a cushioned armchair. Several times in the course of the interview, Miller offered Haynes something to eat and drink, and the opportunity to use the restroom or the telephone. According to Miller, Haynes declined to use the phone, used the restroom once and requested water two or three times. Miller testified that Haynes was awake and alert during the entire interview. At no time did

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16. *Cantu v. State*, 842 S.W.2d 667, 680 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993).

17. *Ibid.*

Haynes indicate that he wanted to speak to an attorney or to terminate the interview.

Initially, Haynes denied involvement in the offenses but changed his story when Miller informed him that his accomplice, Timothy Reese, had implicated him in the murder, that officers were on their way to pick up another accomplice, and that there were eyewitnesses. Haynes asked Miller what would happen if he gave a statement, and Miller replied that he did not know because he did not know what Haynes was going to say. Haynes agreed to give an audio-taped statement, From 12:32 a.m. to 12:52 a.m. Haynes gave his first statement.

At 1:28 a.m. Miller took Haynes before the magistrate. Haynes asked the magistrate when he could make a phone call. The magistrate replied that he could do so after the proceedings were complete. When they returned to Miller's division at 1:40 a.m., Haynes asked to use the restroom, and after he used the restroom, Miller asked him if he wanted to use the telephone. Haynes declined, saying that it was too late to call anyone. Miller told Haynes that he would be booked into the jail shortly and asked if there was anything else that Haynes wanted to say. Haynes responded that he had left out some details in his first statement, so Miller offered him the opportunity to make a second statement. Miller again read Haynes his rights before taking his statement.

The record refutes Haynes's claims that Miller's conduct was overbearing or calculated to overcome his will. It reflects that Haynes's statement was the product of his free and unconstrained choice. The trial

judge did not abuse his discretion. Points of error nine through nineteen are overruled.

In his twentieth and twenty-first points of error, Haynes contends the trial court failed to make findings of fact and conclusions of law, as mandated by Article 38.22, §6, regarding the admission of Haynes's written statement into evidence. After Haynes complained, we abated this appeal until the trial judge prepared and filed his findings and conclusions on the voluntariness of Haynes's confession.[18] Since we have now received those findings and conclusions, these points of error are moot and are overruled.

In his twenty-second through twenty-fifth points of error, Haynes avers that the trial judge erred in denying his challenges for cause to four veniremembers. In reviewing such claims, we examine the record as a whole to determine whether it supports the trial court's ruling.[19] Great deference is shown the trial court because of its advantage as fact-finder, and its ruling is reviewed under an abuse of discretion standard.[20]

When the trial court erroneously denies a challenge for cause, the defendant is harmed only if he uses a peremptory strike to remove the venire member and thereafter suffers a detriment from the loss of the

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18. *Haynes v. State*, No. 73,685 (Tex. Crim. App. May 9, 2001) (unpublished).

19. *Satterwhite v. State*, 858 S.W.2d 412, 415 (Tex. Crim. App. 1993), *cert. denied*, 510 U:S. 970 (1993).

20. *Ibid.*

strike.[21] Because Haynes received two extra strikes, he cannot establish harm without showing that the trial court erroneously denied challenges for cause to at least three different veniremembers.[22] Haynes identified objectionable jurors whom he would have struck but for the trial court's erroneous denial of his challenges for cause.

Haynes challenged M. Williams on the grounds that she was biased against the law upon which he was entitled to rely because she understood the term "probability" in Article 37.071, § 2(b)(l), to be synonymous with "chance." Similarly, Haynes challenged J. Munoz and J. Nelson on the grounds that they understood "probability" to mean "possibility."

Without conceding that the veniremembers were in fact challengeable for cause, the State notes that before a veniremember can be dismissed for cause under Article 35.16(c)(2), the law upon which the challenge is based must be explained to him.[23] The State argues that since Haynes did not explain the legal meaning of probability as the term is used in Article 37.071 to the veniremembers, he did not establish the merit of his challenge for cause and that the trial court did not, therefore, abuse its discretion. The State is correct. The record reflects that Haynes merely asked the

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21. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987).

22. *Martinez v. State*, 763 S.W.2d 413, 425 (Tex. Crim. App. 1988).

23. *Chambers v. State*, 903 S.W.2d 21, 29 (Tex. Crim. App. 1995).

veniremembers whether they viewed these terms as synonymous; he did not explain the meaning of the word "probability." As a result, Haynes's questioning failed to establish that the veniremembers were indeed biased against the law. Haynes's twenty-second, twenty-third, and twenty-fourth points of error are overruled.

In point of error twenty-five, Haynes complains that the trial judge erred in denying his challenge for cause of H. Snyder. Citing *Cumbo v. State*[24] and *Trevino v. State*,[25] Haynes argues that Snyder was prejudiced against the law because he would not consider mitigating evidence. While admitting that Snyder was skeptical of mitigating evidence, the State argues that he would nevertheless consider the evidence presented and could find some very limited circumstances to be mitigating.

The record supports the State's argument. In response to defense counsel's inquiry concerning whether a family could, "for lack of a better term, screw it up so bad that the kid didn't really have a chance," Snyder responded that "[t]he individual is still responsible for his or her actions." In addition, Snyder agreed with defense counsel that he had a "bias against finding mitigation." But Snyder also stated that "[t]here are mitigating circumstances, but they may be few and far between," and that "the probability would be quite low" that he would find mitigating circumstances. These statements indicate that Snyder

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24. 760 S.W.2d 251, 253 (Tex. Crim. App. 1988).

25. 572 S.W.2d 336, 337 (Tex. Crim. App. 1978).

could find some limited circumstances to be mitigating. We conclude Snyder was not challengeable for cause[26] and the trial court did not abuse its discretion. This point of error is overruled.

In points of error twenty-six through twenty-nine, Haynes argues that the trial court erred in overruling his *Batson v. Kentucky*[27] objections to the State's peremptory challenges against four veniremembers: T. Kirkling, M. Goodman, L.V. McQueen, and B. Owens. The *Batson* analysis has three prongs: First, the opponent of the strike has to prove a prima facie case of racial discrimination. In response, the proponent must then produce a racially-neutral explanation for the strike. The challenger may then rebut or impeach this explanation. Next, the trial judge must determine if the challenger has met his burden of establishing purposeful racial discrimination.[28] The proponent of the challenge has the burden of production and persuasion.[29]

We review the trial court's finding under a clearly erroneous standard and will not disturb a trial court's ruling unless it is clear from the record that a mistake

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26. *See Heiselbetz v. State*, 906 S.W.2d 500, 508-09 (Tex. Criin. App. 1995).

27. 476 U.S. 79 (1986).

28. *Hernandez v. New York*, 500 U.S. 352, 356 (1991).

29. *Williams v. State*, 804 S.W.2d 95, 97 (Tex. Crim. App.), *cert. denied*, 501 U.S. 1239 (1991).

has been committed.[30] In making this determination, we review the totality of the circumstances, including the composition of the venire and jury panels, the record of the voir dire examination, and Haynes's rebuttal and impeachment of the State's explanation.[31]

The record establishes that Haynes is African-American and that, of the fifty people in the venire, seven were African-Americans and six appeared for voir dire. The State peremptorily struck four of the six and accepted one venirewoman, whom the defense peremptorily struck; one African-American man was seated on the jury. At trial Haynes raised a *Batson* objection, arguing that the State had used roughly thirty-three percent of its strikes to remove approximately eighty percent of the African-Americans from the jury panel. The State offered its racially neutral explanations.

The prosecutor stated that he had struck T. Kirkling because she avoided taking a firm position on capital punishment. According to the prosecutor, Kirkling had hesitated in responding to questions about the death penalty and had stated that she considered capital punishment "a last resort" and a "necessary evil." The record supports the prosecutor's version of the voir dire. During Kirkling's voir dire, the prosecutor specifically noted Kirkling's hesitation about the death penalty and asked if he should be concerned. She acknowledged her reservations about

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30. *Rhoades v. State*, 934 S.W.2d 113, 123 (Tex. Crim. App. 1996).

31. *Ibid.*

sentencing someone to death, stating that, "on one hand I'm charged with a duty, and on the other hand I have my own personal opinion." She explained her "personal opinion" as being that "sentencing someone to death is a necessary evil" but "that doesn't mean I have to like it." The record supports the prosecutor's explanation. The trial court's denial of Haynes's *Batson* challenge with respect to Kirkling was not clearly erroneous.

Regarding M. Goodman, the prosecutor stated that he struck her because he perceived an underlying reservation with the death penalty. He stated that she "reluctantly agree[d] that capital punishment for police officers should be available." The record of her voir dire supports such a perception. Goodman indicated that she believed "killing a person, to me, would be killing a person, whether they were a police officer or just a regular citizen." After the prosecutor explained to her several times that the law provided that killing a police officer was a capital offense while killing a "regular citizen" was not, Goodman continued to waffle on her stance as to whether she could follow the law or not. She finally stated that she did not have "a problem" with the fact that killing a police officer is a capital offense. The record supports the prosecutor's explanation for striking Goodman.

The prosecutor explained that he struck L.V. McQueen because his responses and demeanor indicated that he was "weak" on the death penalty and that there were some cases in which he could not impose the death penalty even if the law permitted it. The record supports this contention. McQueen stated

that the 40-year minimum term before becoming parole eligible was "an extremely long time" and that anybody who takes someone else's life "should have to pay," but not necessarily with his own life. The trial court's acceptance of the State's explanation was not clearly erroneous.

Finally, as to B. Owens, the prosecutor explained that he struck her because she had a "somewhat humorous" demeanor and "never really did take on a serious attitude during the interview." The prosecutor stated that Owens "would say one thing but her body language would indicate that this is not her true feeling." Based on her demeanor, the prosecutor believed that, if guilt was established, Owens was "leaning toward a life sentence." The record does reflect that Owens was congenial and easygoing during voir dire and that her attitude was less formal than that of other veniremembers. The trial judge's acceptance of the State's explanation was not clearly erroneous. These points of error are overruled.

In point of error thirty, Haynes argues that the trial judge erred and denied him due process by presiding over the *Batson* hearing even though he had not presided over the voir dire examination. But Haynes did not preserve any alleged error. At the *Batson* hearing, Haynes's lawyer said, "Your Honor, just for the record, two things I would like to at this point assert: The record needs to reflect in this matter that with respect to the individuals voir dired that this Judge, namely, Judge Wallace, was not present but Judge Harper so the Court does not have the benefit of having participated in the individual voir dire."

Counsel then continued with his "second" point, rebutting one of the State's arguments regarding its strikes being race-neutral. The record reflects that counsel never objected to the trial judge's presiding over the hearing. He simply asked 'that the record reflect that this was the case. The trial judge never responded to counsel's comment in any way. Haynes's complaint is procedurally defaulted.

Within this point of error, Haynes also argues that deference cannot be given to the trial judge's rulings because the judge lacked the "healthy skepticism" necessary to preside fairly over a *Batson* hearing.[32] He claims that because the trial judge did not observe the voir dire, he could not accurately assess or scrutinize the prosecutor's explanations which were largely based on the demeanor of the particular veniremembers.

Haynes is partly correct. Because the trial judge did not witness the actual voir dire at issue, his position as fact-finder with regard to the demeanor of the veniremembers at issue is no better than that of this Court. Thus, we owe him no deference.[33] We do not agree, however, that a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge. There are many factors which a trial judge – even one who did not preside over the voir dire examinations – can consider in determining whether the opponent of the peremptory strikes has met his burden. These include

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32. *Citing Daniels v. State*, 768 S.W.2d 314 ,317 (Tex. App.–Tyler 1988, pet. rcf'd).

33. *See, e.g., Garcia*, 15 S.W.3d at 535-36.

the nature and strength of the parties' arguments during the *Batson* hearing and the attorneys' demeanor and credibility.[34] And, when necessary, a trial judge who has not witnessed the voir dire may refer to the record.

Haynes argues that the trial judge in this case ignored the record and accepted the prosecutor's explanations at face value, thereby abdicating his constitutional obligation to fairly evaluate, and not merely rubber stamp, the State's explanation.[35] But regardless of whether the trial judge referred to the record, any concern arising from this situation is moot, because we have not given him deference and have ourselves reviewed the voir dire record. We overrule this point of error.

In his thirty-fifth point of error, Haynes argues Article 37.071, § 2(f)(2), violates the Eighth Amendment. Specifically, Haynes argues the 10-12 instruction does not allow individual jurors to give effect to their finding that certain evidence is mitigating. Haynes's arguments are indistinguishable from arguments we have repeatedly addressed and rejected.[36] This point of error is overruled.

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34. *See Purkett v. Elem*, 514 U.S. 765 (1995) (focus is on whether opponent of strike has met burdens); *Ford v. State*, 1 S.W.3d 691, 693-94 (Tex. Crim. App. 1999).

35. *Keeton v. State*, 749 S.W.2d 861, 865-68 (Tex. Crim. App. 1988) (opinion after abatement).

36. *E.g., Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000).

In his thirty-sixth point of error, Haynes argues that the trial judge denied him a fair trial. Haynes argues that the judge betrayed a bias, violated his right to counsel, and sabotaged his appeal when he silenced his attorney's objections to the State's closing arguments by ordering counsel to sit down and then threatening to have counsel removed from the courtroom. In point of error thirty-seven, Haynes argues the trial judge erred in denying his motion for a new trial based on the same complaints.

The incident Haynes complains about occurred during the State's closing arguments at the punishment phase of trial. Mr. Smyth represented the State. Mr. Nunnery was Haynes's lead counsel.

Smyth: You know your whole life is going to be changed by this trial. You know –

Nunnery: I'm going to object to that comment, too, your Honor, that their whole life is going to change. That's improper jury argument. That's him personalizing with the jury, which is outside the record and improper jury argument.

The Court: It's overruled.

Smyth: Thank you, Judge. Could I have additional time to continue due to argument?

Nunnery: Your Honor, I'm going to object to his sidebar remarks.

The Court: Have a seat. Have a seat. Have a seat.

Nunnery: Your Honor, can I have a ruling on my objection.

The Court: I said sit down, Mr. Nunnery.

Nunnery: Your Honor, I'm required by law to ask for a ruling for [sic] objection.

The Court: You have one second to sit down or I'll remove you from the courtroom. Do we understand each other?

The closing arguments continued without any further objections from the defense. At the close of arguments, after the jury was dismissed, Mr. Nunnery identified various instances of alleged improper jury argument and stated:

> [I] ask the record to reflect that I would have objected to each and every one of those comments but for the court's admonition that if I stood again you would have me removed from the court. And in that manner I believe that I was not permitted to render a Sixth Amendment effective assistance of counsel to my client with respect to the argument.

The trial court took the opportunity to explain its ruling:

> Let the record reflect that at no time was counsel ordered not to stand and make an objection. The ruling of the Court at the time was for counsel to sit down at that time with regard to that particular confrontation or objection that he had and in no way did the Court ever instruct counsel that he was not able to effectively represent his client by making objections. And counsel's interpretation of that is for counsel's purposes only.

At the hearing on the motion for new trial, Mr. Nunnery testified that in seventeen years of practice he had never been threatened by a judge and that he felt degraded and humiliated by the trial judge's threats. Mr. Nunnery testified that after the judge threatened him, he sought to protect himself from further humiliation and expulsion from the courtroom at the expense of his client's interests, meaning that though he should have raised further objections, he failed to do so for fear of being removed from the courtroom.

Every defendant is guaranteed a fair trial and the atmosphere essential to this end must be maintained by the trial judge at all costs.[37] A judge must govern the proceedings and himself to ensure this result. An attorney must be free to play the critical role necessary in our adversarial system. A trial judge violates this right when he interferes with counsel's ability to make

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37. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

independent decisions.[38] He must not restrict counsel's constitutional function of defending against a criminal prosecution.[39]

We must determine, under the totality of the circumstances, whether Haynes received a fair trial.[40] This requires close scrutiny of the record with particular focus on the trial judge's conduct in view of the allegations raised.[41]

The record does not support Haynes's allegation of judicial bias. The harsher effects of the court's ruling were inadvertent. Haynes does not allege a pattern of intrusion with defense counsel's ability to make decisions, and we find no such pattern. Most importantly, we find no evidence that counsel was in fact denied the opportunity to object to improper arguments. Mr. Nunnery asserted at the hearing on his motion for new trial:

> What I am saying there weren't things there that I thought so glaring that it might make any difference on appeal. . . . I did not see any glaring mischaracterization of evidence on your part so all I am simply saying is that I

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38. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

39. *Herring v. New York*, 422 U.S. 853, 857-58 (1975).

40. *See Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989)

41. *E.g., Zima v. State*, 553 S.W.2d 378, 380 (Tex. Crim. App. 1977).

> may have raised some objections at that time but they may not have been the type that when I walked out of here and talked to the appellate lawyer and say look at Mr. Smyth's argument. I didn't see any of that at all in your arguments.

And when asked directly, Mr. Nunnery claimed no objectionable argument was actually found in the record.

> Smyth: Even with twenty-twenty hindsight and reading the printed argument of Mr. Smyth, there was really nothing objectionable in that particular argument?
>
> Nunnery: In my opinion, again, nothing that I would say was so glaring that it was absolutely essential.

Counsel's failure to identify any arguments so egregious that his objection would have required reversal or at least an instruction to disregard confirms our conclusion that the State made no such arguments. We cannot hold that Haynes was denied the opportunity to raise objections when the record reveals that there in fact were no objections to be made. Haynes's thirty-sixth and thirty-seventh points of error are overruled.

The judgment of the trial court is affirmed.

DATE DELIVERED: October 10, 2001

DO NOT PUBLISH

U.S. COURT OF APPEALS
FILED
JUN 2 2009

CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 07-70004

ANTHONY CARDELL HAYNES,

Petitioner - Appellant

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

- - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Texas at Houston

- - - - - - - - - - - -

ON PETITION FOR REHEARING EN BANC

(Opinion 3/10/009, 5 Cir., ____, ____ F.3d ____)

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. And 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James Dennis
United States Circuit Judge

REHG-6A

REPORTER'S RECORD

VOLUME 22 OF 42 VOLUMES

TRIAL COURT CAUSE NO. 783,872

ANTHONY CARDELL HAYNES	IN THE DISTRICT COURT
Appellant,	
VS.	HARRIS COUNTY, TEXAS
THE STATE OF TEXAS	
Appellee.	263RD JUDICIAL DISTRICT

****

VOIR DIRE

****

[Page 14]

* * *

THE COURT: Let's talk about Batson.

MR. NUNNERY: Your Honor, first of all, for the record, I would ask that the Court to take judicial notice of the fact that the defendant in this cause, Anthony Cardell Haynes, is a black American. I'd ask the record to further take notice of the fact that of the 50 jurors in the poll - - one, two, three, four, five, six, seven - - seven that qualified are African American origin. That with the exception of Mr. Alton Moore,

juror number 47, who we were not able to reach, all the other jurors of African American descent were reached.

I would ask the record to further reflect that juror number 40, Twanna Kirkling, a black female, was struck by the State of Texas.

Juror number 16, Kirling.

THE COURT: Wait a minute. Number 40?

MR. NUNNERY: She is on the panel as juror number 10.

THE COURT: Let's keep the same numbers.

MR. NUNNERY: Number 10.

THE COURT: That's number 11.

MR. NUNNERY: Black female was struck by the State, [Page 15] Juror number 16, Melba Goodman.

THE COURT: That's number 50.

MR. NUNNERY: Juror number 15, Melba H. Goodman, is a black female that the State struck.

Juror number 30, L. V. McQueen

THE COURT: Yes.

MR. NUNNERY: - - is a black male the State struck, and juror number 40, Betty Owens.

THE COURT: 41.

MR. NUNNERY: 41 is a black female and the State struck.

And, Judge, what were the total number of strikes that the State used?

THE COURT: Not counting the alternates, 15 - - I'm sorry. 13 strikes.

MR. NUNNERY: Well, they used one, two - - four of their 13 strikes which is roughly 30 percent of - - 33 percent of their strikes, Your Honor, to eliminate roughly 80 percent of those blacks in the veniremen. We think just the sheer numbers raise a presumption of a racial motive for the strikes, and we would ask the Judge to order that they articulate on the record why those black jurors were excluded.

THE COURT: All right. Number 11, Ms. Kirkling, from the State.

MR. VINSON: First of all, I would like to make the [Page 16] record clear on the list before I proceed. We accepted Melba Williams.

THE COURT: Let's talk about numbers.

Number 8.

MR. VINSON: Number 8 was a black female. We accepted her. The defense struck.

We did accept juror number 4. We accepted juror number 4, a black male.

THE COURT: He is on the jury.

MR. VINSON: The defense accepted.

Twanna Kirkling, number 11, the State exercised a strike for Ms. Kirkling because, during her interview, she said capital punishment was a last resort, meaning

several times she hesitated in responding to the questions about the death penalty. She never would give a firm conviction, Your Honor. For that purpose, I did not trust her. I would strike her again if I had another strike.

THE COURT: I find that to be a reasonable race neutral reason.

MR. NUNNERY: Your Honor, just for the record, two things I would like to at this point assert: The record needs to reflect in this matter that with respect to the individuals voir dired that this Judge, namely, Judge Wallace, was not present but Judge Harper so the Court does not have the benefit of having participated in the individual voir dire. [Page 17]

Let the record further reflect with respect to juror number 8, Melba Williams White, the defense during individual voir dire made a motion to challenge her for cause and the State obviously knew that I would strike her and, if so, I'm just not impressed with the fact that they found her acceptable. They had to know I was going to strike her.

THE COURT: Mr. Vinson.

MR. VINSON: With respect to Ms. Kirkling, again, I want to put some more on, Your Honor, that as she looked at capital punishment, she said she sees it as a necessary evil. I feel it meant indication that there is something impermissible about having such punishment available to the State. She further avoided giving any direct position on capital punishment that it was a viable object for the State and, furthermore, she stated that life, 40, is a

justifiable punishment. And for that, since she had a preconceived notion toward capital punishment, we exercised our strike.

MR. NUNNERY: For the record, we believe that is a mischaracterization of her voir dire. That indeed there were other jurors who articulated the same view that capital punishment is a necessary evil and just believe the Court at the conclusion, since I obviously have about 70 of these to go through, I will supplement the record to show that those reasons exercised by the State with respect to that juror are pretext and simply does not equate with what some of the [Page 18] jurors in the pool said that have already been accepted.

THE COURT: Very well. Number 15.

MR. VINSON: Ms. Goodman, number 15. Ms. Goodman during - - again, these are my impressions of the interview. I think I have a right to have that impression. We opposed death punishment. She refused to answer questions about capital punishment. She reluctantly agrees that capital punishment for police officers should be available. She also demonstrated through her demeanor that she was very anti-capital punishment and I have a picked a number of capital jurors and I did not trust this juror.

THE COURT: I find it to be race neutral.

Number 30.

MR. VINSON: And where Ms. McQueen, again, when questioned, Ms. McQueen would give me all the indications that in responses to my questions by the language of demeanor that he was very weak on the

death punishment and did not - - and stated that there were some cases that I could not give a death sentence even if the law permitted such and again I struck him as well.

MR. NUNNERY: Your Honor, for the record, they have a challenge of cause if, in fact, he said that they could challenged her for cause and, furthermore, the questionnaire will reflect that he checked four that he was in favor of capital punishment on his questionnaire. [Page 19]

MR. VINSON: 4, 2.

MR. NUNNERY: He checked a strong second on the number 35 and strong belief in capital punishment. Again, Judge, it's pretext for an obvious racial reason to eliminate that juror.

THE COURT: It's race neutral.

Number 41, please.

MR. VINSON: During the interview, this lady's demeanor was one, I guess, best I can describe it, somewhat humorous. She never did really take on a serious attitude during the interview. She would say one thing but her body language would indicate that this is not her true feeling. And I'm sure that Mr. Jones reasonably expected us to strike this lady after she was interviewed because I think Mr. Jones voir dired her and he only talked to her for a very short time because he was very pleased with the things she said, more as she was leaning toward them. If the defendant was found guilty, she would certainly be leaning toward a life sentence. And with that, I drew

a conclusion in my mind, based on my observation, that she already had a predisposition and would not look at it in a neutral fashion.

MR. JONES: May it please the Court - - I am Robert Jones - - in regard to that juror, her questionnaire certainly shows that she was a juror who had a leaning towards the State's case in a capital case. As a matter of fact, her [Page 20] questionnaire reflected only after the Court indicated to her what capital murder was that she would have caused a lesser burden of proof on the part of the State. And my questions to her were in regard to her change of mind and why now she was answering the questions in the fashion she was. She tended to indicate, once she had information, she could be fair and impartial to both sides and she indicated she understood the law and she would apply the law and she would not be biased to either side. I think it is a misconception that I had a feeling that she was friendly towards me and she was responsive to the questions.

MR. NUNNERY: Let me just indicate, for the record, having tried a number of capital cases, that it's always been my feeling that the State does not want educated blacks on their jury. This particular juror is a nurse and she has a college degree and, therefore, she would probably bring thought processes and that's something the State has consistently shown not to be interested in.

MR. VINSON: I find that offensive. I tried many cases, I think, in this court and I have tried and I have never had a jury in this court or any court in Harris

County, Texas, that consisted of all whites and I find that offensive.

THE COURT: It's race neutral.

What else?

(Jury panel's presence.) [Page 21]

THE COURT: All right, ladies and gentlemen. We have now the jury selected. As I call your name, would you please have a seat in the jury box. And I will call two alternates up, please.

(Jurors called.)

THE COURT: Let the record reflect the jury has been seated.

* * *

OPPOSITION BRIEF

No. 09-273

IN THE SUPREME COURT OF THE UNITED STATES

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

v.

ANTHONY CARDELL HAYNES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(FORMER CAPITAL CASE)

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the unanimous opinion of the Court of Appeals for the Fifth Circuit correctly apply *Batson v. Kentucky*, 476 U.S. 79 (1986) in ordering a new trial when the prosecutor's strikes of prospective jurors were based on alleged demeanor evidence which was not observed by the trial judge who ruled on them?

2. Did the Fifth Circuit correctly conclude that the state courts' factual findings were objectively unreasonable where the trial judge could not reach the third step of the *Batson* analysis and neither the trial judge nor the state courts engaged in the "factual inquiry" required under *Batson*?

3. Was there any presumption of correctness for the state court ruling that the peremptory strikes were not racially motivated when they were based on a cold record for an issue that turned on demeanor that was not observed?

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I. A grant of *certiorari* is not warranted because the state court decision was contrary to clearly established federal law and an unreasonable determination of the facts. 4

a) The Fifth Circuit correctly held that the state decision was contrary to, and involved an unreasonable application of clearly established Federal law (28 U.S.C.§2254(d)(i)). 5

b) The state decision was also based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (28 U.S.C.§2254(d)(ii)) 10

II. No AEDPA deference is due to the state court opinion and Haynes has shown "by clear and convincing evidence" under 28 U.S.C. §2254(e)(1) that the state court findings were erroneous 16

III. The petition should not be granted because there is no "circuit split" requiring this Court's intervention. 20

IV. The petition should be denied because the Fifth Circuit's decision is squarely in line with this Court's *Batson* jurisprudence 23

V. The Director has repeatedly changed his position on the reasons for the strikes. 26

VI. The Fifth Circuit's decision will not "drastically complicate" jury selection as the Director claims. 27

VII. The Director misstates and overstates the holding of the Fifth Circuit. 29

VIII. The petition should be denied because the Director's arguments regarding the demeanor of the prosecutor are unavailing 30

IX. The petition should not be granted because the Fifth Circuit's decision to grant a new trial and not a *Batson* hearing is not contrary to "established practice" and there are compelling reasons why the Fifth Circuit did so 33

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COUNTER-STATEMENT OF THE CASE

A. Relevant Procedural History.

This is a capital habeas corpus matter brought by respondent Anthony Cardell Haynes, a Texas death row inmate, pursuant to 28 U.S.C. §§ 2253 & 2254. On April 23, 2008, in a published opinion, a unanimous panel of the Fifth Circuit granted Haynes a Certificate of Appealability ("COA") on "[w]hether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror Owens; and...as to potential juror McQueen." *Haynes v. Quarterman*, 526 F.3d 189, 202-203 (5th Cir. 2008)("*Haynes I*"), *see* App.[1] at 13-40).

After further briefing, oral argument was held in this matter on January 13, 2009. On March 10, 2009 (revised March 11, 2009), a unanimous panel of the Fifth Circuit issued another published opinion reversing the district court's denial of habeas relief and remanding the case to the state trial court with instructions to order the State to either grant Haynes a new trial or release him from custody within 180 days. *Haynes v. Quarterman*, 561 F.3d 535 (5th Cir. 2009)("*Haynes II*", *see* App. at 1-12).[2]

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[1] "App." refers to the Appendix to the Petition for Writ of Certiorari filed by Petitioner.

[2] The prosecutor struck four of the five African-Americans in the venire, Ms. Kirkling, Ms. Goodman, Mr. McQueen and Ms. Owens. App. 183-189. The Fifth Circuit granted a Certificate of Appealability as to two strikes, that of Mr. McQueen and Ms. Owens. *Haynes I*, 526 F.3d at 202. The *Haynes II* opinion held that "[b]ecause we find a *Batson* [*v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)] violation as to prospective juror Owens, we need not analyze

Petitioner (hereafter "the Director") then filed for rehearing *en banc*, which was unanimously denied by the Fifth Circuit on June 2, 2009, no member of the panel or the Fifth Circuit having requested that the Court be polled. (App. at 180-181). The Director now asks this Court to grant certiorari. For the reasons discussed *infra*, the petition should be denied.

B. Facts Relevant To The Petition.

Respondent Anthony Haynes, an African-American, was convicted of killing off-duty Houston Police Officer Kent Kincaid on May 22, 1998. Tex. Penal Code § 19.03(a)(1). He was sentenced to death. At voir dire, the trial judge accepted without comment or elaboration the prosecutor's explanation of his strikes against four of the five African-American prospective jurors, Ms. Kirkling, Ms. Goodman, Mr. McQueen and Ms. Owens. (App. at 183-189). Additional relevant facts are summarized in the Fifth Circuit's opinion:

> Two different state trial judges took turns presiding over the jury selection process in this case at the state court level. Judge Wallace presided at the beginning of the jury selection process when the jurors were addressed and questioned as a group; Judge Harper presided during the next stage in which the attorneys questioned the prospective jurors individually; and Judge Wallace presided again during the final stage in which peremptory challenges were

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the alleged violation as to prospective juror McQueen." *Haynes II*, 561 F.3d at 541 n.2. Haynes presented extensive facts and evidence in the court below that showed the *Batson* violation as to Mr. McQueen was as strong as that involving Ms. Owens. (*See* Haynes's Fifth Circuit brief at 30-35; reply brief at 20-22). Because the Fifth Circuit first found a violation as to Ms. Owens and hence did not need to reach Mr. McQueen, the facts surrounding his strike will not be discussed herein.

> exercised and when *Batson* challenges were made, considered, and ruled upon. During the *Batson* hearing, the defendant established a *prima facie* case of a *Batson* violation, and the prosecutor justified his use of peremptory challenges against potential jurors McQueen and Owens *solely*[3] on his impression of their demeanor when responding to individual *voir dire* questioning (at which time Judge Wallace was not presiding).
> *Haynes II*, 561 F.3d at 537-538 (App. at 3)(emphasis and footnote in original).

REASONS FOR DENYING THE PETITION

Rule 10 of this Court ("Considerations Governing Review on Certiorari") states:

> [a] petition for writ of certiorari will be granted only for compelling reasons. The following...indicate the character of the reasons the Court considers:...(a) a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter...[or a] United States court of appeals has...decided an important federal question in a way that conflicts with relevant decisions of this Court."
> Supreme Court Rule 10.

Neither consideration is implicated here. The Fifth Circuit's decision is not in conflict with the decisions of other circuit court of appeals or with any decision of this Court. The Director's arguments for certiorari, however, are contrary to this Court's settled *Batson* jurisprudence, other circuits' precedents, and they do not comport with the facts of this case, as shown herein. The petition should be denied.

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[3] "The State agrees on appeal that the prosecutor relied solely on demeanor evidence in making these challenges."

I. A grant of *certiorari* is not warranted because the state court decision was contrary to clearly established federal law and an unreasonable determination of the facts.

The Director frames his question as follows:

"Is a capital defendant entitled to a new trial under *Batson v. Kentucky,* 476 U.S. 79 (1986), even where there has been no judicial finding of a racially motivated peremptory strike?" (Petition for Writ of Certiorari (hereafter, "Pet.") at i).

The Director amplifies this question in Question A:

> Specifically, does this Court's recent decision in *Snyder v. Louisiana,* 128 S. Ct. 1202 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire firsthand? (Pet. at i).

These questions and the Director's entire argument are based on a flawed reading of *Batson*, its progeny, and the facts of this case.

The Fifth Circuit held that Haynes met his burden under 28 U.S.C. §2254(d), that relief can be granted if the state court decision either 1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court (28 U.S.C.§2254(d)(i)), or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (28 U.S.C.§2254(d)(ii)). Haynes' *Batson* claim met both prongs of §2254(d).

a) The Fifth Circuit correctly held that the state decision was contrary to, and involved an unreasonable application of clearly established Federal law (28 U.S.C.§2254(d)(i)).

The State has conceded that Haynes "made a *prima facie* showing that the peremptory challenge [of Owens] had been exercised on the basis of race." *Haynes II,* 561 F.3d at 539(App. at 7).[4] This is *Batson's* first step. At *Batson*'s second step, "the burden shifts to the prosecutor to present a race-neutral explanation for striking the jurors in question." *Batson v. Kentucky,* 476 U.S. 79, 97-98 (1986); *Snyder v. Louisiana,* 128 S. Ct. 1203, 1207 (2008). The Director's argument falters at *Batson*'s second step, as both *Haynes* opinions point out. In *Haynes I,* the Fifth Circuit held:

> Under *Snyder*'s application of *Batson,* therefore, an appellate court applying *Batson* should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge. Consequently, we conclude that the district court arguably erred in finding that the state courts properly relied upon the prosecution's 'demeanor' explanations for its peremptory challenges of jurors McQueen and Owens...
>
> In respect to Owens, the district court deferred to the Texas Court of Criminal Appeals' reliance on the prosecutor's allusion to Owens's demeanor as the sole justification for finding that the prosecution's peremptory challenge of her was 'race neutral.'...
>
> However, Judge Wallace, the state trial judge who upheld the peremptory challenges of McQueen and Owens, could not have possibly credited the prosecutor's assertion that they were struck because of their demeanor during individual questioning; Judge Wallace did not preside during the individual examination of the jurors...Further, the district court did not find another

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[4] The same concession was made as to prospective juror McQueen, but the Fifth Circuit did not reach Mr. McQueen as they had already found a violation as to Owens. *Haynes II,* 561 F.3d at 541 n.2.

credible non-racial explanation that could justify the state court's determination that the peremptory challenge of Owens and McQueen was 'race-neutral.' Thus, arguably, the State has failed to satisfy *Batson*'s second step.
Haynes I, 526 F.3d 189, 200 (App. at 33).

As the *Haynes II* panel held:

In this case, the trial court and the state appellate court did not conduct a 'factual inquiry' or a 'sensitive' inquiry into the demeanor-based reasons because neither court applied the relevant observations of the juror's demeanor despite the trial court's role and experience overseeing the individual *voir dire.* The state appellate court in this case found that both the trial judge and the appellate court made their *Batson* determinations from the same appellate fact-finding position, *i.e.,* from the cold paper record, and therefore the state court concedes there was no trial fact-finding.
Haynes II, 561 F.3d at 541 (App. at 10-11).[5]

The state appellate court had earlier concluded that:

Because the trial court did not witness the actual voir dire at issue, his position as fact-finder with regard to the demeanor of the veniremembers at issue *is no better than that of this Court.* Thus, we owe him no deference...But regardless of whether the trial judge referred to the record, any concern arising from this situation is moot, because we have not given deference and have ourselves reviewed the voir dire record.
Haynes v. State, No. 73,685 (Tex. Crim. App. 2001)(App. at 173-174); cited in *Haynes II,* 561 F.3d at 541 (App. at 11)(emphasis in original).

As the Fifth Circuit panel explained, "[t]aking this conclusion to its logical end,

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[5] There were no comments or explanations by Judge Wallace in ruling on all four strikes of African-Americans. *See* App. at 185 (22 RR 16)(as to Twanna Kirkling, "I find that to be a reasonable race neutral reason"; App. at 186(22 RR 18)(as to Ms. Goodman, "I find it to be race neutral;" App. at 187 (22 RR 19)(as to Ms. McQueen, "[i]t's race neutral"); and App. at 189 (22 RR 20)(as to Ms. Owens, "[i]t's race neutral"). The rulings were in rapid succession, with no indications Judge Wallace read or referred to any transcript or record, and no recess or break for reflection or consideration. ("RR" refers to the Reporter's Record, the trial transcript in this case.)

we cannot correspondingly apply AEDPA deference to the state court, because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." *Haynes II*, 561 F.3d at 541 (App. at 11). This Court, as the Fifth Circuit pointed out, has held that "[i]t is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants." *Id*, citing *Wainwright v. Witt*, 469 U.S. 412, 428 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984); *see also Ciccarello v. Graham*, 296 F.2d 858, 860 (5th Cir. 1961). Thus, the Director's argument falters at *Batson*'s second step: because the strikes were based on non-verifiable demeanor, the prosecutor failed to meet his burden to produce a race-neutral explanation for the strikes. As a result, neither the trial court nor the appellate court were able to conduct the necessary factual inquiry.[6]

The Director's argument is based on a flawed and impermissibly lenient reading of the requisite "factual inquiry" under *Batson*. This Court and numerous courts of appeal have held, in case after case, that an "inquiry" such as that made by the state courts here is insufficient. *See Batson*, 476 U.S. at 95 ("the trial court must undertake a 'factual inquiry' that 'takes into account *all possible explanatory factors*' in the particular case")(emphasis added); *Batson*, 476 U.S. at 93 (trial court must "undertake

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[6] The Director notes that "[s]tep three of *Batson* 'involves evaluating the persuasiveness of the justification' proffered by the prosecutor...' (Pet. at 10, quoting *Rice v. Collins*, 546 U.S. 333, 338 (2006). This highlights the deficiencies of the inquiry at that step, as the trial court could never reach step three of *Batson* and "evaluate the persuasiveness" of the explanations.

'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'", quoting *Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 266 (1977)); *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005)("[h]ence *Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination"); *Johnson v. California*, 545 U.S. 162, 170 (2005)("we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated"); *Snyder*, 128 S.Ct. 1203, 1208 ("the [Supreme] Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be a *Batson* error, all of the circumstances that bear upon the issue of racial discrimination must be consulted"). *See also*, *Moody v. Quarterman*, 476 F.3d 260, 267-268 (5th Cir. 2007)(trial court's decision not to follow three-step analysis for *Batson* challenge was unreasonable application of clearly established law).

The Director's argument is directly contrary to *Snyder*'s clarification of *Batson*:

> The trial judge committed clear error in rejecting the *Batson* objection to the strike...[although] Deference is owed to a trial judge' finding that an attorney credibly relied on demeanor in exercising a strike, but here, the trial judge simply allowed the challenge without explanation...the trial court must evaluate not only whether...the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecution.
> *Snyder*, 128 S. Ct. at 1204-1205, 1208.

The Director makes another error in the formulation of the initial question, which assumes that the lack of a "judicial finding of a racially motivated peremptory strike" is at variance with this Court's *Batson* precedents. (Pet at i). Here again, this error stems from the Director's misconception of the *Batson* analytical framework and the inability of the trial or appellate courts in this case to reach step three of the analysis, where the explanation could be evaluated and the findings made. Both *Haynes I* ("the district court did not find another credible non-racial explanation that could justify the state courts' determination that the peremptory challenge of Owens and McQueen was "race-neutral." Thus, arguably, the State has failed to satisfy *Batson*'s second step," 526 F.3d at 200); and *Haynes II* ("[i]t is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants," 561 F.3d at 541) point this out.

Relief has frequently been granted in *Batson* cases without the finding of a racially motivated strike. *See, e.g., Simmons v. Beyer,* 44 F.3d 1160 (3d Cir. 1995), *cert. denied,* 516 U.S. 905 (1995)(*Batson* violation found due to lost transcript; panel found prejudice because it could not fairly review the *Batson* claim); *Bui v. Haley,* 321 F.3d 1304 (11th Cir. 2003)(relief granted due to unreasonable state court fact-findings); *Henderson v. Walls,* 296 F.3d 541 (7th Cir. 2002), *cert. granted, judgment vacated,* 537 U.S. 1230 (2003)("First, we are not making a finding that this evidence

supports a finding of discrimination—such a finding would be appropriate only after a proper statistical analysis").

Here, as in *Snyder*, 128 S. Ct. at 1212, there is nothing in the record to indicate that the trial judge credited the prosecutor's demeanor claim, or his other explanations for the strike, when all the trial judge said was "[i]t's race neutral." (App. at 189). We cannot even tell what "it" referred to. The trial court's "factual inquiry" was certainly inadequate under all this Court's *Batson* precedents and those of the circuit courts.

b) The state decision was also based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (28 U.S.C.§2254(d)(ii)).

The Fifth Circuit held that the Texas Court of Criminal Appeals' "factual inquiry" was inadequate, flawed and clearly erroneous because it merely rubber-stamped the trial court's finding without any evidence of a factual inquiry. *Haynes II*, 561 F.3d at 540-541 (App. at 10-13). Additionally, this finding was clearly erroneous, as the record contradicts the prosecutor's reasons for the strike.[7]

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[7] The Fifth Circuit in *Haynes II* did not delve into the factual record showing the pretextual nature of the prosecutor's explanations for the strikes because it was not necessary to do so. *See* analysis in section I(a) *supra*. Here, however, it will be necessary, as many of the Director's factual assertions are at variance with the record and this Court has held that all potentially relevant arguments and issues must be included in the Brief in Opposition. *See, e.g.*, Supreme Court Rule 15.2 ("non-jurisdictional argument not raised in respondent's brief in opposition to a petition for writ of certiorari may be deemed waived"); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009)(failure to dispute factual assertion in brief in opposition was "reason to accept this fact for purposes of our decision in this case").

The Director, with disregard for the record, states Question A as follows:

> Specifically, does this Court's decision in *Snyder v. Louisiana,* 128 S. Ct. 1203 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire firsthand?
> (Pet. at i).

This question seriously distorts the factual record in this matter, in multiple ways. The Director has cited nothing in the record that supports the prosecutor's statement that prospective juror Owens exhibited a "friendly demeanor" towards defense counsel.[8] Nor is it even clear what "explanation" the trial judge accepted.

Nor was the prosecutor's explanation "unrebutted."[9] Actually, defense attorney Jones stated that Ms. Owens' questionnaire responses indicated that she "was leaning towards the State's case...[and therefore] I think it is a misconception that I had a

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[8] In the court below and at oral argument the Director alleged that the "friendly demeanor" of Ms. Owens was shown when the defense attorney and Ms. Owens discussed women's basketball and one player in particular who Owens explained was "the bomb. She's the bomb." (18 RR 268). The record reveals a single question about this player and then one very brief comment about the game. (18 RR 268). The attempt to parlay this brief exchange into some sort of "friendly demeanor"or "rapport" with defense counsel is simply another indication of the specious nature of the attempt at non-racial explanations for this strike. Other non-African-American jurors had more extensive informal interactions with defense counsel, some of which related to sports. For instance, juror Michael Bonnin had a long discussion about coaching and baseball (6 RR 169-70); there was a discussion about the building of a baseball park with juror Marilyn Hitchcock (18 RR 204-205); and an interchange about the Civil War with juror Mr. Helton (10 RR 124).

[9] *See also* Pet. at 6-7 ("Notably, Jones did not dispute Vinson's assessment of Owens's demeanor; he argued only that Vinson's perception of defense counsel's view towards Owens was mistaken.")

feeling that she was friendly towards me and she was responsive to the questions." (App. at 188). This was a direct rebuttal of the prosecutor's claim.

The record backs up defense counsel's rebuttal. In fact, this potential juror gave many answers that were very pro-prosecution:

1) At voir dire, Ms. Owens had absolutely no opposition to capital punishment. (18 RR 231).

2) In fact, she supported it. Asked what she would do if she imposed the death penalty and she was confronted with someone who opposed capital punishment, Ms. Owens stated that "[t]his is a free country...just because I respect him...does not mean I have to think the same way that he thinks." (18 RR 233).

3) She agreed with the statement that the Bible "delegates to government authority to carry out...capital punishment." (18 RR 235).

4) Ms. Owens also stated that people accused of murder should be treated differently than people accused of other crimes. (18 RR 246).

5) She said she could answer the special issues "yes or no...it just depends upon what's presented to me." (18 RR 250).

6) Ms. Owens stated she had no prohibition against the death penalty simply because the defendant was young. (18 RR 251).

7) She repeatedly stated that the decision to give the death penalty would

depend on the evidence. (18 RR 252-253).

8) She even stated in the questionnaire that "any person, man or woman, young or old who commits murder should pay with his own life." (18 RR 254). In fact, she affirmed this answer twice. (*Id.*)

9) On her questionnaire, she stated that the death penalty should be used more often. (18 RR 259).

10) She also apparently thought the death penalty appropriate in areas where it was not permitted, until talked to by the judge in the initial group voir dire. (*Id.*)

11) Ms. Owens stated that she could consider the range of punishments available. (18 RR 266).

12) And on her questionnaire she wrote "a life is lost, and murder punishment should be harsher--" (18 RR 269).

13) Additionally, her ex-husband, with whom she was still in recent contact, used to be a Captain with the Texas Department of Corrections at the Ramsey Unit. (18 RR 235-236).

Even more revealing, and central to the prosecutor's reason for his strike, was his claim that the defense "only talked to her a very short time because he was pleased with the things she said..." (22 RR 19)(App. at 187). This was actually the main justification for the strike because from that the prosecutor stated that because of the

alleged short questioning time "I drew a conclusion in my mind...that she already has a predisposition and would not look at it in a neutral fashion." (22 RR 19)(App. at 187). This is simply not true as the record indicates. Mr. Jones questioned Ms. Owens for a full *22 pages* of transcript. (18 RR 255-276). The prosecution had questioned her only slightly longer, 28 pages (18 RR 226-254), but, as with all the other jurors, they covered many introductory matters regarding her background, prior questioning, and procedures that did not need to be re-raised by the defense. (*E.g.*, at 18 RR 227-238). The length of Ms. Owens' questioning was not at all unusual or longer than defense questioning of some non-black jurors and alternates. For instance, non-black juror Michael Bonnin, juror no. 2 (2 CR 431) was questioned even less, for only 20 pages, by the defense. (6 RR 166-186). Non-black juror no. 10 Lois Thorn (2 CR 431) was questioned by the defense for only 21 pages. (15 RR 249-270). Alternate non-black juror Julie Kosatka (2 CR 431) was questioned for only 20 pages by the defense. (19 RR 192-212). Non-black alternate juror Karen Rodriguez (2 CR 431) was questioned by the defense for only 16 pages. (19 RR 247-263). Non-black juror Sharon Malazzo, juror no. 5 (2 CR 431), was questioned by the defense for a little less than 23 pages. (10 RR 288-311). Another indication the "very short" defense questioning was pretextual is that Patrick Nformangum, juror no. 1 (2 CR 431) was questioned for a little over 23 pages when the court stopped the questioning

and said "time's up." (5 RR 114-137).[10] If 23 pages was the full allotted time, 22 pages can hardly be seen as "very short." Thus, it should be seen as pretextual and evidence of a discriminatory motive.

Mis-characterizing a prospective juror's testimony to justify a strike supports an inference of discrimination. A basic principle is that "[t]he prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208. *See also Snyder* at 1212 ("the explanation for the strike...is by itself unconvincing and suffices for the determination that there was *Batson* error"); *Miller-El v. Dretke,* 545 U.S. 231, at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step"); *Id.* at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.");[11] *Purkett v. Elem,* 514 U.S. 765, 768 (1995)(*per*

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[10] Each side was given 30 minutes for questioning. (*See, e.g.*, 10 RR 199). In the questioning of juror Jacqueline Nelson, juror no. 4 (2 CR 431) the defense stated "I have gone here for almost my 30 minutes" (10 RR 199) which took 24 pages. This is another indication that the prosecutor's termination of 22 pages as "very short" was pretextual as it was close to the allotted 30-minute limit.

[11] As in *Miller-El*, a Dallas County case, there is also a long and well-documented history of racial discrimination in Harris County. *See, e.g., Harris v. Texas*, 467 U.S. 1261, 1263 (1984)(Marshall, J., dissenting, accepting "well-marshaled evidence" that Harris County

curiam)("At [the third] stage, implausable or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"). There is a very obvious reason for this principle: short of an outright admission by the prosecutor that "yes, we challenged them for racial reasons," this is the best and most reliable evidence of a racial motivation for the strikes. Here, the prosecutor's reasons for striking both Ms. Owens do not comport with the record.

Thus, although this showing of an "unreasonable determination of the facts" was not discussed in *Haynes II*, as the Fifth Circuit found a violation under 2254(d)(i), it is clear that Haynes also was entitled to relief under 2254(d)(ii).

II. No AEDPA deference is due to the state court opinion and Haynes has shown "by clear and convincing evidence" under 28 U.S.C. §2254(e)(1) that the state court findings were erroneous.

In section V of the petition, the Director argues that the refusal of the Fifth

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prosecutors "had systematically excluded Negro jurors in case after case over an extended period of time"); *Tompkins v. State*, 774 S.W.2d 196, 203 (Tex.Crim.App. 1987)(Texas Court of Criminal Appeals acknowledged evidence that Harris County District Attorney's Office used its peremptory challenges to systematically exclude blacks from juries); *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989)(Texas Court of Criminal Appeals reversed appellant's conviction, finding that Harris County prosecutor had "exercised peremptory challenges based solely on race"); *Williams v. State*, 804 S.W.2d 95, 107 (Tex. Crim. App. 1991)(documenting the evidence of systemic exclusion of prospective jurors of color by the Harris County District Attorney's Office); *Vargas v. State*, 859 S.W.2d 534, 535 (Tex.App.-Houston [1st Dist] 1993 (Harris County prosecutor found to engage in disparate treatment); *Emerson v. State*, 851 S.W.2d 269, 272 (Tex. Crim. App. 1993)(Texas Court of Criminal Appeals impugned Harris County prosecutor for engaging in disparate questioning and treatment of African-American veniremembers); *Thomas v. State*, 209 S.W.2d 268 (Tex. Crim. App. 2006)(appellant's conviction reversed, holding that Harris County prosecutor engaged in disparate treatment).

Circuit to apply "AEDPA deference" to the state court's ruling merits summary reversal. (Pet. at 25-29). This argument is without merit.

AEDPA does not use the word "deference." It talks in terms of a standard of review, discussed *supra* in section I as to §2254(d)i and (d)ii and in this section as to §2254(e)(i). The Director frames the issue of deference as follows:

> The Fifth Circuit also gave no deference to the trial court's factual conclusion that the prosecutor's demeanor-based reason for striking Ms. Owens was credible. App. at 189. In so doing, the court below disregarded not only the plain text of the AEDPA itself, but this Court's precedents implementing the AEDPA's required deference to trial courts' *Batson* decisions.
> Pet. at 27.[12]

The "deference" is actually a "presumption of correctness" that can be rebutted "by clear and convincing evidence." § 2254(e)(1). The Director frames the presumption as an insurmountable obstacle, whereas Haynes presented in the courts below voluminous evidence that rebutted it by clear and convincing evidence, as shown *supra* in section I. *See, e.g., Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003) "[d]eference does not by definition preclude relief"); *Purkett v. Elem,* 514 U.S. at 769 (presumption of correctness of factual findings of state courts is rebuttable and can be set aside if they were "not fairly supported by the record"); *Hernandez v. New*

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[12] In a like vein, the Director also states that "[t]he Fifth Circuit's misunderstanding of § 2254(e)(1) originates in its misconception of the relevant factual inquiry...the issue at step three is not whether the prosecutor's perception of a juror is accurate, but simply 'whether the trial court finds the prosecutor's race-neutral explanations to be credible.'" (Pet. at 29), quoting *Miller-El,* 537 U.S. at 339.

York, 500 U.S. 352, 371-372 (1991)(policy of striking venirepersons "without regard to the particular circumstances of the trial or the individual responses of the jurors may be found by the trial judge to be a pretext for racial discrimination"); *Guidry v. Dretke*, 397 F.3d 306, 327 (5th Cir. 2005)(presumption of correctness rebutted when trial court made no findings on considerable conflicting evidence)("[a]ccording to the dissent, the district court must defer to trial court factual determinations, even when they are presented without explanation concerning extremely important and conflicting evidence. On the contrary, certainly on this record, such absence [of explanation] suggests an unreasonable determination"). Even just plain unconvincing justifications for the strike give rise to inferences of impermissible racial discrimination. *Snyder*, 128 S. Ct. at 1208 ("the explanation for the strike...was unconvincing and suffices for the determination that there was *Batson* error").

This Court and others have all made clear that a demeanor reason not credited by the trial judge or supported in the record does not carry any weight, is entitled to no deference, and is insufficient in itself. *Snyder*, 128 S. Ct. 1208-09; *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986), *overruled in part on other grounds, Pope v. Illinois*, 481 U.S. 497 (1987)("[t]here might be instances, however, in which the presumption [of correctness] would not apply to appellate factfinding...For example, the question...might in a given case turn on credibility determinations that could not

be accurately made by an appellate court on the basis of a paper record"); *see also United States v. Reed*, 277 Fed.Appx. 357, 364 n.6 (5th Cir. 2008)("In *Snyder*...the first reason, the juror's nervousness, was insufficient by itself because the record materials could not convey the juror's demeanor absent a specific finding by the trial judge...").

Dolphy v. Mantello, 552 F.3d 236 (2d Cir. 2009) once again makes clear that under AEDPA there is no need for deferential review in federal habeas proceedings when the state trial court fell short of adjudicating the defendant's *Batson* claim on the merits by simply accepting at face value the prosecutor's proffered race-neutral explanation. There, as in Mr. Haynes's case, the trial court made no inquiry or finding concerning the credibility of the prosecution's explanation. *Dolphy*, 552 F.3d at 237-238. Under *Batson*, the mere proffer of a facially neutral reason is insufficient. As here, in *Dolphy*, the

> the judge's words seemed to assume that a race-neutral explanation (*Batson* step two) was decisive and sufficient: 'I'm satisfied that is a race-neutral explanation, so the strike stands.'...such a conclusory statement does not necessarily indicate even by inference that the trial court credited the prosecutor's explanation, especially since i) the judge's words suggested that the proffer of a race-neutral explanation was itself enough, and ii) the explanation given here lends itself to pretext")

Dolphy, 552 F.3d at 239. *See also Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000)("Jordan now declares that the district court's conclusory statement that the prosecutor's explanations were race neutral did not satisfy *Batson*. We agree");

Barnes v. Anderson, 202 F.3d 150, 156 (2d Cir. 1999)(holding that "denial of a *Batson* motion without explicit adjudication of the credibility of the non-movant's race-neutral explanations for challenged strikes" constitutes error); *Moody v. Quarterman,* 476 F.3d 260, 267-268 (5th Cir. 2007)("As to AEDPA's requirement that this court defer to the state trial court findings of fact, this directive is not applicable as to this state trial court because it failed to make any findings of fact relative to the heart of Moody's [*Batson*] claim").

The Director's arguments for "deference" are thus unavailing and Haynes showed by clear and convincing evidence that the state court findings were erroneous. 28 U.S.C. §2254(e)(1).

III. The petition should not be granted because there is no "circuit split" requiring this Court's intervention.

While the Director attempts to frame this case as a "mistaken reading" and "mistaken application" [of *Snyder v. Louisiana,* 128 S. Ct. 1203 (2008)] (Pet. at 2, 3, 17-20) upon which the Fifth Circuit allegedly "relied primarily" (Pet. at 17) the decision in *Haynes II* is a straightforward application of *Batson.*

The Director cites only one case in support of his contention that the Fifth and Seventh Circuits have "misinterpreted" *Snyder* and that there is a "circuit split" : *Smulls v. Roper,* 535 F.3d 853 (8th Cir. 2008)(*en banc*). (Pet. at 19, 26). But *Smulls* does not support the Director's contentions. In *Smulls,* the Eighth Circuit held that the

trial court's failure to make explicit findings did not relieve the court of appeals of its duty to reconstruct the record or view the trial court findings as presumptively correct. *Smulls*, 535 F.3d at 861-863. In that case, the trial judge, who had witnessed the voir dire, asked the prosecutor for his reasons for the strike, and he gave specific answers: a glare, an aversion of her eyes, an irritated answer, her occupation as a postal worker, his past bad experiences with such employees, and his striking of a white postal worker in the same matter. *Smulls*, 535 F.3d at 856, 864-867.

> In short, the trial court considered the challenge and the related circumstances and arguments, including its observations of [the struck juror] and made its ruling, a ruling it made four times in two days...the trial court immediately allowed the defense ample opportunity to make its argument that the proffered reasons were pretextual...it allowed the defense to make the record it chose to make, considered the arguments, and then denied the motion...The following day, the defense again raised the *Batson* challenge. The trial court allowed both parties to address the issue and supplement the record. The trial court once again denied the challenge, but only after once again listening to the arguments made by counsel...Given this extensive record, the trial court cannot be criticized for failing to afford the defense an opportunity to respond, nor can it be fairly criticized for failing to consider the relevant circumstances raised by the attorneys." *Id.* 535 F.3d at 863-864.

Contrast the situation in *Smulls* to the situation in *Haynes*, where both the trial court and the Texas Court of Criminal Appeals *did not and could not* make explicit fact findings, and therefore could not even reach *Batson*'s third step. Even if the trial court had done so, a reconstruction of the record reveals the prosecutor's explanations as false and pretextual. Again, the Director's argument falters because he fails to

consider the requirement of a *Batson* three-step analysis.

The Director quotes *Haynes II* as holding that it "interpret[s] *Batson* to require 'the trial court's observations of individual jurors if relevant to the prosecutor's explanation.'" (Pet. at 19, *quoting Haynes II,* 561 F.3d at 540). The Director has omitted a crucial word, however. The actual quote from *Haynes II* is "we read *Batson* to require the *application* of the trial court's observations of individual jurors if relevant to the prosecutor's explanation." (*Id.*) *Haynes II* never *requires* the observations, but like *Batson, Miller-El,* and *Snyder* it requires a full factual inquiry which would include the application of the judge's personal observations in that inquiry, if they are relevant.[13]

Nor has any "circuit split" yet appeared in terms of the impact of *Haynes II* in other circuit courts that would require summary reversal. (Pet. at 17-20). In more than seven months since *Haynes II* was handed down, it has been cited only twice, in unpublished district court opinions, neither of which involve a *Batson* issue. *Moore v. Norris,* 2009 WL 1616001 (E.D. Ark. Jun. 9, 2009); *Johnson v. Quarterman,* 2009

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[13] Nor does the state court case the Director cites, *People v. Bramit,* 210 P.3d 1171 (Cal. 2009) help his argument. (Pet at 19). In *Bramit* defense counsel argued that "deference to the trial court is inappropriate unless the court expressly states that it is excusing the juror on the basis of demeanor." As the *Bramit* court made clear, "*Snyder* said no such thing....the high court held that deference to the trial court is 'especially' appropriate when the judge actually makes a determination that an attorney relied on demeanor in exercising a strike. The court did not hold that deference is only permissible when such an express determination was made below" (citing *Snyder,* 128 S. Ct. at 1209. *Bramit,* 210 P.3d at 1184 n.7. The Director makes the identical argument here, and this misconception is central to his misreading of *Snyder* and *Haynes II.*

WL 22553238 (S.D. Tex July 27, 2009). It appears that other litigants and courts do not see *Haynes II* as the outlier from the heartland of this Court's *Batson* jurisprudence that the Director makes it out to be.

IV. The petition should be denied because the Fifth Circuit's decision is squarely in line with this Court's *Batson* jurisprudence.

Contrary to the Director's arguments, the decision of the Fifth Circuit is squarely in line with this Court's *Batson* jurisprudence and it is the Director's arguments that would represent a "significant departure." (Pet. at 10-17). None of the cited cases from this Court implicate or are contrary to the Fifth Circuit's holding in *Haynes II.*

The Director cites *Rice v. Collins,* 546 U.S. 333 (2006) for the proposition that "a trial court may credit a peremptory strike based on juror demeanor the trial court did not personally observe." (Pet. at 11). *Rice* however, provides no support for the Director's contentions as this was a case in which the Ninth Circuit "improperly substituted its evaluation of the record for that of the state trial court." *Rice* at 334. There, unlike here, nothing suggested that the trial court "failed to conduct a searching inquiry of the prosecutor's reasons for striking [the juror]." *Id.* at 337. In *Rice,* the prosecutor provided "a number of other permissible and plausible race-neutral reasons" for the strike other than the explanation the Ninth Circuit saw as unreasonable (eye-rolling) which the judge did not see. *Id.* at 339-342. Here, however,

the "searching inquiry" consisted, in its entirety, of three words, "it's race neutral" (App. at 189), and the prosecutor provided *no* plausible explanation beyond demeanor that the judge did not witness, and one implausible explanation that is contradicted in the record, that the defense attorney "only talked to her for a very short time." (App. at 187). Instead of *Rice*'s "searching inquiry" all we have here is "[i]t's race neutral." (App. at 189).

Nor does *Hernandez v. New York,* 500 U.S. 352 (1991) provide any help for the Director. (Pet. at 12-13). There, the responses and demeanor of some Spanish-surnamed prospective jurors led the prosecutor to doubt their ability to defer to the official translation of the Spanish language testimony, a plausible non-racial motive. *Hernandez,* at 363-364, 370. The judge observed the voir dire and the attorneys' interactions with the jury. The categories of who the prosecutor thought would defer to the translations and who would not included both Latinos and non-Latinos. Additionally, there was no motive for the prosecutor to exclude Latinos as both victims and witnesses were also Latino and the prosecutor did not know which prospective jurors were Latino. *Id.* at 369-370. Indeed, these were all factors that were specific to Hernandez's trial, but striking venirepersons "'without regard to the peculiar circumstances of the trial' might constitute a pretext for racial discrimination." *Purkett v. Elem,* 514 U.S. 765, 774 (1995), quoting *Hernandez,* 500

U.S. at 371-372. Here, the "demeanor" of the prospective jurors was a factor that had no relation to the circumstances of Haynes' trial, and *Hernandez* actually undermines the Director's argument.

Lastly, by overstating the Fifth Circuit's holding, the Director cites *Purkett v. Elam,* 514 U.S. 765 (1995) as standing for the proposition that "a trial court's failure to observe juror demeanor...does not render the court categorically ineligible to assess counsel's credibility." (Pet. at 14). But *Haynes II* does not hold this. The Director again falls into error in not analyzing *Batson*'s three step process. *Purkett* stresses the necessity of following this process, which the trial court here failed to do. The *Purkett* court held that

> "[u]nder our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the trike to come forward with a race-neutral explanation (step two).
> *Purkett,* 514 U.S. 765, 768.

The Court emphasizes that even a "silly or superstitious" reason will get the prosecutor to step three, but here the court could not even go on to that step because the reason offered, demeanor, was not observed by the court. *Purkett* emphasizes the need for the step three analysis, which was missing here. ("It is not until the *third* step that the persuasiveness of the justification becomes relevant–the step in which the trial court determines whether the opponent of the strike has carried his burden..."). *Id.* at

768).

Thus, none of this Court's authorities cited by the Director support his argument.

V. The Director has repeatedly changed his position on the reasons for the strikes.

The Director has once again, for the third time, changed his position and argument on the reasons for the strikes. In his initial brief in the Fifth Circuit, he asserted at length that there were reasons for the strikes other than demeanor. (*See* the Director's Brief at 6-7, 20-21, 26-30). However, at oral argument the Director asserted that the strikes and his argument were based "solely on demeanor."[14] The panel relied upon the Director's "demeanor only" argument in holding that "the prosecutor justified his use of peremptory challenges against potential jurors McQueen and Owens *solely* on his impression of their demeanor" and a footnote points out that "[t]he State agrees on appeal that the prosecutor relied solely on demeanor evidence in making these challenges." *Haynes II,* 561 F.3d at 538, n. 1(emphasis in original).[15]

However, in his petition for *en banc* rehearing, the Director switched back to

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[14] *See* the recording of the January 13, 2009 oral argument of this case on the Court's website at www.ca5.uscourts.gov/OralArgumentRecordings.

[15] As noted *supra*, the opinion addresses only potential juror Owens, who was excused solely on the grounds of demeanor, and did not consider McQueen.

"factors other than demeanor," as his second issue was:

> Was the trial court's credibility finding that a prosecutor's proffered justification for striking a juror based on demeanor was race-neutral entitled to a presumption of correctness *when the trial court necessarily relied on factors other than the juror's demeanor in making the determination*?
> Petition for Re-Hearing, at 2. (emphasis added).

Now, once again, the argument has shifted back to "demeanor only." The reason for these repeated shifts is clear, and it can be likened to an attempt to steer, like Odysseus, between the twin dangers of Scylla and Charybdis. On one hand there is the Scylla of "demeanor only," attempting to avoid the implications of *Snyder*, which holds that if there was more than one explanation for the strikes, and "the record does not show that the trial judge actually made a determination concerning [the prospective juror's] demeanor...[and] simply allowed the challenge without explanation," this is a violation of *Batson*. *Snyder*, 128 S. Ct. at 1209; *quoted in Haynes I*, 526 F.3d at 199. This was pointed out at oral argument in the Fifth Circuit. On the other hand, there is the Charybdis of asserting there were "other reasons than demeanor" for the strikes, which founders on *Snyder* as well as the other *Batson* factors. Both stances on the reasons for the strikes are equally unavailing.

VI. The Fifth Circuit's decision will not "drastically complicate" jury selection as the Director claims.

In section IV (Pet. at 23-25), the Director conjures up the scepter of dire consequences for jury selection, as "the Fifth Circuit's reasoning would require trial

courts to both observe and remember every venire member's behavior and demeanor—an impossible task given the many days and dozens of prospective jurors that often pass between voir dire and a *Batson* hearing." (Pet. at 24). This would allegedly "blink reality," impose a "heavy burden" on the trial courts, and be "unworkable. (*Id.*) Yet the Fifth Circuit's opinion imposes no new or heavier burden on courts than that which already exists. It is simply ludicrous to claim that the entire process depends on the memory of the judge, as it is common practice for judges to make either written or computerized notes on the bench during voir dire.[16] Additionally, it is somewhat insulting to the judiciary to assert that judges are incapable of doing what the attorneys currently *must* do in the *Batson* context. The defense attorney has to articulate a *Batson* challenge regarding a particular strike of a venire person, the prosecutor has to articulate his reasons for that strike, and the defense attorney has to refute the explanation. Both tasks require recalling and examining earlier questioning or demeanor, and the judge has no greater burden than the prosecutor or defense attorney. Of course, since the invention of writing (and the computer) the parties do not have to rely on memory, as the Director claims, but on their notes taken during the jury selection process.

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[16] The practice of judicial note-taking is not universal, however, and the record here indicates that Judge Harper was actually performing gun repair on two revolvers during the jury selection in Mr. Haynes' trial, not taking notes, for at least part of the voir dire. He was subsequently reprimanded for this conduct. (*See* note 20 *infra*).

Additionally, as discussed *supra* (*e.g.*, note 14), the Director's misguided alarm stems from a misreading of *Snyder* and *Haynes II*. Neither *Snyder* nor *Haynes II* hold that deference is permissible only when such an express determination regarding demeanor was made in the trial court. *Snyder*, 128 S. Ct. at 1207-1209. The Director's misreading of *Haynes II* leads to this error.

VII. The Director misstates and overstates the holding of the Fifth Circuit.

Repeatedly, the Director frames the holding of the Fifth Circuit as requiring "a new trial...solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire beforehand." (Pet. at i) ("Questions Presented"). *See also* Pet. at 2 ("a trial court need not personally observe a prospective juror's demeanor in order to credit a prosecutor's explanation...[this] mistaken application..."); at 10 ("a novel theory"); at 11 ("if the decision below was correct, then *Batson* and its progeny must all be wrong").

The *Haynes II* opinion does not hold what the Director represents it to hold, that the trial judge must observe the demeanor. Here again, the Director confuses the holding in *Haynes II*. It did not hold that deference is only permissible when an express determination of demeanor was made. But *Haynes II* and *Snyder* make clear that a demeanor reason not credited by the trial judge or supported in the record does not carry any weight, is entitled to no deference, and is insufficient in itself. *Snyder*,

128 S. Ct. 1208-09; *Haynes II*, 561 F.3d at 541.

Thus, it is misleading to state that "[t]he court below held that Judge Wallace's *Batson* ruling was based solely on 'the cold paper record' and was therefore invalid per se," citing *Haynes II* 561 F.3d at 541. (Pet. at 10). What the opinion actually held was that "[t]he state appellate court in this case found that both the trial judge and the appellate court made their *Batson* determinations from the same appellate fact-finding position, i.e., from the cold paper record, and, therefore, the state court concedes there was no trial fact-finding." *Haynes II*, 561 F.3d at 541. The opinion was talking about the findings of the state court and the deficiencies of the trial court fact-finding, not holding that findings from a "cold paper record" are invalid per se in all cases. As discussed *supra* in section I, it is also abundantly clear from the record that Judge Wallace's ruling was not based on any "fact-finding" at all, when all he says is "[i]t's race neutral" or "I find it to be race neutral" four times in quick succession without a pause or even an explanation. (*See* App. at 185-189).

VIII. The petition should be denied because the Director's arguments regarding the demeanor of the prosecutor are unavailing.

The Director states that a "key" part of his argument is that

> a *Batson* challenge turns on the sincerity—not the accuracy—of the prosecutor's reason for striking a prospective juror. The Court has recognized that the credibility of the prosecutor—completely ignored by the Court

below—is the key issue in determining intent under *Batson*."
(Pet. at 2).

The Director argues that the Fifth Circuit's decision was wrong because "[t]hat holding ignores the trial court's firsthand observation of the most relevant demeanor—that of the attorney exercising the strike." (Pet.at 10-11). He attempts to buttress this argument by citing language from *Hernandez* which states that when there is not much evidence on the believability of the prosecutor's explanation, that "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez v. New York*, 500 U.S. 352, 365 (Pet. at 12-13).[17]

This "key" argument completely ignores the fact that the relevant "attorney demeanor" discussed in *Hernandez* is the demeanor of the attorney during the questioning of the challenged juror, in terms of their interactions, not the attorney's later demeanor (or persuasiveness) in front of a different judge who did not see the attorney-juror interactions. *Hernandez*, 500 U.S. at 361-365.[18] The judge in

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[17] As at the Fifth Circuit oral argument, the Director again puts great weight on this argument: "Similarly, the panel's assertion that the trial court made the credibility determination entirely 'from the cold paper record'...disregards the trial court's firsthand observation of both the prosecutor's demeanor in explaining his race-neutral reasons as well as defense counsel's response." (Pet. at 13). And again: "the Fifth Circuit did not cite a single decision holding that a trial judge cannot assess a prosecutor's demeanor-based reason for striking a juror based on the trial court's firsthand observation of the prosecutor's credibility." (Pet. at 26).

[18] In *Hernandez*, unlike Mr. Haynes' trial, the judge *did* observe the voir dire and the prosecutor's strikes, and the factors the prosecutor offered there, such as ability to speak Spanish, were observed by the trial judge. In contrast to *Hernandez* and most cases where "[t]here will seldom be much evidence bearing on [the believability of the prosecutor's explanation] here there is abundant record-based evidence that directly contradicts the

Hernandez did observe the attorneys and the prospective jurors at voir dire. *Hernandez,* 500 U.S. 355-358. But the only "attorney demeanor" Judge Wallace could access at the *Batson* hearing was the persuasiveness of the prosecutor and defense attorney's statements regarding conduct he had not observed. The Director's argument, if accepted, would virtually gut this Court's *Batson* jurisprudence, as any after-the-fact explanation could be accepted on the premise that the trial judge found the prosecutor's demeanor at the *Batson* hearing persuasive or "credible," even if the proffered explanation was not supported by the facts or the record. In effect, the Director is inviting this Court to accept the persuasiveness or glibness of the prosecutor's after-the-fact argument as a valid basis for a *Batson* strike.[19] This dangerously *ad hoc* standard would provide a virtual *carte blanche* for the re-legitimization of racial discrimination in jury selection, exactly what the *Batson* line of cases intended to eliminate. Thus, *Hernandez* is not at all similar to the situation here, nor is it helpful to the Director.

The Director's argument clearly does not comport with *Batson,* 476 U.S. 79 at 98("If these general assertions [prosecutor's denial of a discriminatory motive or assertions of good faith] were accepted as rebutting a defendant's prima facie case, the

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prosecutor's explanations. All this evidence is ignored by the Director in his petition.

[19] Here, in fact, it would be the entire basis for the strikes.

Equal Protection Clause 'would be but a vain and illusory requirement'"); *Miller-El*, 545 U.S. 231 at 240 (2005)("If any factually neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*" [*v. Alabama*, 380 U.S. 202 (1965); and *Purkett v. Elem*, 514 U.S. 765, 769 (1995)("this [*Batson*] warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith"). The Director's "demeanor" argument is precisely the nebulous, prejudice-prone, subjective standard that these *Batson* cases seek to eliminate.

IX. The petition should not be granted because the Fifth Circuit's decision to grant a new trial and not a *Batson* hearing is not contrary to "established practice" and there are compelling reasons why the Fifth Circuit did so.

The Director asserts that the Fifth Circuit should have remanded the case for a reconstruction *Batson* hearing before a federal or state court judge rather than ordering a new trial. (Pet. at 20-22). However, the Director's claim that this is "routine" is overstated and incorrect. "The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner." *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Many courts have ordered new trials upon the finding of a *Batson* violation. In fact, in the circumstances here,

over ten years after Haynes' trial, this Court has expressly dictated a new trial: "[n]or is there any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." *Snyder,* 128 S.Ct. at 1212. The factors that inclined the *Snyder* court to decline a remand for a new trial were the absence in the record of the demeanor explanation, and the proffer of a pretextual explanation by the prosecutor. *Id.* Both factors are operative here: the Director can point to nothing in the record that supports the alleged demeanor explanation and the prosecutor based his challenge on alleged "short questioning" which has been shown to be false. Other courts have similarly ordered new trials rather than a remand for a *Batson* reconstruction hearing. *See, e.g., Simmons v. Beyer,* 44 F.3d 1160 (3d. Cir. 1995)(remanded for new trial); *Turner v. Marshall,* 121 F.3d 1248, 1251 (9th Cir. 1997); *Riley v. Taylor,* 277 F.3d 261, 294 (3rd Cir. 2001)(*en banc*); *Bui v. Haley,* 279 F.3d 1327, 1336-1339 (11th Cir. 2002); *Reed v. Quarterman,* 555 F.3d 364 (5th Cir. 2009).

There is another compelling reason why a remand for a *Batson* reconstruction hearing, at least to the state court, would be ill-advised. This is the fact, discussed at the oral argument in the Fifth Circuit, that the record shows that the judge who conducted the voir dire, Judge H. Lon Harper, was actually cleaning two pistols on the bench when the prospective jurors were being questioned during Mr. Haynes' voir

dire.[20] As Fifth Circuit Judge Clement observed at the oral argument, a *Batson* "reconstruction hearing" 10 years after the trial would be futile, as Judge Harper likely wouldn't remember what occurred as he was preoccupied with his gun repairs. There could hardly be any more persuasive showing of racial prejudice in Mr. Haynes' trial than the officially-condemned behavior of this judge.

X. Even if the same judge had witnessed both the voir dire and the explanations, Haynes would still be entitled to relief under *Batson*.

The Director attempts to frame this case as holding that *Haynes II* required a new trial "solely because the trial judge...did not also observe voir dire firsthand." (Pet. at i). This view is erroneous, as discussed *supra*. But even if Judge Wallace *had* observed the voir dire, Haynes would clearly still be entitled to relief.

This case does not depend on the difference in judges, although it certainly

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[20] *See, e.g.*, Affidavit of Patrica Davis, Exhibit 11 to the district court petition ("During the part where the jury was chosen, the judge presiding over it, Judge Lon Harper, was cleaning a pistol while he was on the bench, in full view of the potential jurors."). Judge H. Lon Harper was officially reprimanded for his conduct at the voir dire in this case. *See* "*Judge Reprimanded For Repairing Revolvers On Bench*" by Mary Flood, *Houston Chronicle*, July 13, 2000, Sec. A page 25 ("Visiting state District Judge H. Lon Harper was reprimanded for trying to repair two guns on the bench during a capital trial proceeding, the State Commission on Judicial Conduct announced today...Harper was sitting as a visiting judge in the fall of 1999 picking a capital murder jury in the case of Anthony Cardell Haynes..."); *see also* "*Houston Judge Faulted For Fixing Guns In Court*," *Dallas Morning News*, July 13, 2000; "*Pistol-Packing Judge Is Told Off*," Telegraph (UK), by Philip Belves Broughton, July 14, 2000 ("Judge H. Ron Harper was admonished..."for failing "to maintain order and decorum in the courtroom...Mr. Harper, a visiting state District Judge, was supposed to be overseeing jury selection in the case of Anthony Cardell Haynes, who was facing the death penalty..."); *Public Reprimand of H. Lon Harper, Former District Court Judge*, Texas Commission on Judicial Conduct (06/28/00)("The judge disassembled and reassembled two revolvers during voir dire in a capital murder case.")

makes the violation much clearer and more egregious. However, if Judge Wallace had observed the voir dire, Haynes would still be entitled to relief because of the failure of the judge to conduct an adequate enquiry at *Batson*'s third step as his ruling was ambiguous—what explanation was "race neutral"? Was it demeanor, alleged short questioning by the defense or anti-death penalty attitudes? (App. at 187-189). This violates *Batson, Miller-El* and *Snyder.* Secondly, there was no indication the trial judge even referred to the record, as in *Snyder*. Third, it is clear that Judge Wallace failed to consider all available evidence, such as defense counsel's rebuttals, which he refused to reference, which violates both *Batson* and *Miller-El.* And fourth, Judge Wallace's ruling is contradicted by the record, which shows no anti-death penalty bias or short questioning of Ms. Owens. All of these factors, individually and in combination, show a failure at step three of the *Batson* analysis even if Judge Wallace had been present during the voir dire.

XI. The Director's non-retroactivity argument is without merit.

In section V(A) of the petition, the Director argues that *Haynes II* announces a new *Batson* rule. (Pet. at 25-27). Contrary to the Director's assertions, non-retroactivity is no bar to relief. The Fifth Circuit opinion recognized that Haynes sought only the application of a fair reading of *Batson,* decided in 1986, well before his conviction became final. *Haynes II,* 561 F.3d at 539-541 (Section B of the opinion is

entitled "*A Batson Violation Occurred and Habeas relief is required*"). The *Haynes II* opinion was not a "new rule" nor did *Snyder* announce any such "new rule" as that case is framed wholly in terms of the earlier *Batson* decision. *See Snyder*, 128 S. Ct. 1203, 1204 (holding that the trial judge committed clear error in rejecting the *Batson* challenge); *Id.* at 1208 ("the explanation for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error"); 1212("the question presented at the third stage of the *Batson* inquiry is..."); *Id.* at 1206-1212 (entire analysis in *Snyder* is dictated by *Batson*). Courts interpreting *Snyder*, including the Fifth Circuit, have come to similar conclusions. *See, e.g., Haynes I*, 526 F.3d at 199 ("[u]nder *Snyder's* application of Batson "*Snyder*...applied its understanding of *Batson* to a similar factual issue" (*Id.* at 200); *United States v. Williamson*, 533 F.3d 269, 274 (5th Cir. 2008)("the Supreme Court has made plain that appellate review of alleged *Batson* errors is not a hollow act," citing *Snyder*); *Abu-Jamal v. Horn*, 520 F.3d 272, 282 (3rd Cir. 2008)("The most recent guidance from the Supreme Court on *Batson* comes from *Snyder v. Louisiana*..."); *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008)("the basic framework for challenging jury composition has remained unchanged," citing *Snyder*).

Here too, in an attempt to find a "new rule," the Director's arguments founder on a mis-perception of the holding of *Haynes II*. The Director states that "[s]ignificantly, the Fifth Circuit did not cite a single decision holding that a trial judge cannot assess a

prosecutor's demeanor-based reason for striking a juror based on the trial court's firsthand observation of the prosecutor's credibility." Pet. at 26. The Fifth Circuit did not cite any such decisions because that was not the holding of *Haynes II*, which was squarely within the *Batson* framework.

The Director's mistaken reliance on non-retroactivity arises from a failure to appreciate that *Snyder* is firmly rooted in *Batson*, announces no "new rule" and merely confirms the correct resolution of Mr. Haynes' *Batson* claim.

CONCLUSION

For the foregoing reasons, the Director's petition for certiorari should be denied.

DATED: October 26, 2009.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

RICK THALER,
Petitioner,
v.
ANTHONY CARDELL HAYNES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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STATUTES

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No. 09-273

In the Supreme Court of the United States

RICK THALER,
Petitioner,
v.
ANTHONY CARDELL HAYNES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

In his brief in opposition, Haynes introduces a number of factual allegations into this case that have nothing to do with, and are nowhere mentioned in, the ruling below—and bear no relevance to the strength or weakness of the State's petition for certiorari. The issues presented by the State remain the same:

The Fifth Circuit is forcing the State of Texas to release or retry a confessed murderer, a decade after he was duly convicted by a fairly selected jury—not because of evidence of a racially motivated strike, but precisely because of the *lack* of such evidence. The court below essentially reasoned that, because the trial judge who ruled on the *Batson* claim did not personally

witness the juror demeanor on which the prosecutor justified his strike, our legal system must *presume* that the strike was racially motivated and award new trial accordingly. This is not only a dramatic departure from this Court's established *Batson* jurisprudence and a misreading of this Court's recent ruling in *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008). It also turns our legal system on its head, by presuming that a criminal conviction is invalid unless proven otherwise.

For his part, Haynes does not deny this understanding of the ruling below. To the contrary, his response brief proudly defends the awarding of relief under *Batson* in the absence of a judicial finding of a racially motivated strike. Resp., at 5-9. In so doing, his response only dramatizes the need for summary reversal to prevent further misapplications of *Snyder*.

Moreover, Haynes fails to address the growing circuit split over the proper interpretation of *Snyder*. In the twenty months since *Snyder*, federal courts of appeals have already split 2-2, including both criminal and civil cases. State supreme courts and intermediate appellate courts have also split, with courts in Kentucky, New Jersey, and Texas siding with Haynes, and courts in California, Mississippi, and New York against him. In sum, the split is real, and without this Court's attention, it will only continue to grow.

Accordingly, the Court should either summarily reverse the judgment below, or in the alternative, grant the petition for certiorari.

I. SUMMARY REVERSAL IS PROPER BECAUSE THERE IS NO RIGHT TO A NEW TRIAL ABSENT A JUDICIAL FINDING OF AN IMPROPERLY MOTIVATED STRIKE.

Haynes devotes several pages of his brief to alleging various defects in how the trial court handled the three-step *Batson* inquiry. Each of those allegations fail. But more importantly, Haynes says nothing to escape the conclusion that, under *Batson*'s three-step inquiry, he retains the ultimate burden of persuasion regarding racial motivation—and is not entitled to a new trial absent a judicial finding of a racially motivated strike.

First, Haynes erroneously asserts that "the prosecutor failed to meet his burden to produce a race-neutral explanation for the strikes." Resp., at 7. But as the panel recognized (and Haynes himself concedes), the prosecutor explained that he struck Ms. Owens based solely on her demeanor. App., at 187-88; *Haynes v. Quarterman*, 561 F.3d 535, 537 (CA5 2009) ("*Haynes II*"). Juror demeanor is, of course, a facially race-neutral reason, *see Snyder*, 128 S.Ct., at 1208—and that is all that *Batson* requires at step two, *see Rice v. Collins*, 546 U.S. 333, 338 (2006). (Haynes also criticizes the State for arguing below that the prosecutor gave "reasons for the strikes other than demeanor," Resp., at 26, but he concedes that Ms. Owens "was excused solely on the grounds of demeanor," *id.*, at 26 n.15, and that hers is the only strike at issue here, *id.*, at 1-2 n.2.).

Second, Haynes contends that the prosecutor had no right to rely on juror demeanor to justify the strike,

because the judge who ruled on the *Batson* challenge was not present during *voir dire* and thus could not have personally viewed the juror. But this contention misunderstands the *Batson* inquiry in two fundamental respects.

The purpose of *Batson* is to prohibit racially motivated strikes. Accordingly, a *Batson* challenge turns on the sincerity—not the accuracy—of the prosecutor's explanation for the strike. As this Court explained in *Hernandez*, and reaffirmed in *Snyder*, this stage of the *Batson* inquiry "involves an evaluation of the prosecutor's credibility, and 'the *best evidence [of discriminatory intent]* often will be the demeanor of the attorney who exercises the challenge.'" *Snyder*, 128 S.Ct., at 1208 (emphasis added) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality op.)). Haynes thus wrongly disparages the trial court for having relied exclusively on "the cold paper record." Quite the contrary, the trial court relied on the live testimony of the prosecutor, which is "the best evidence" under *Batson*.

Haynes responds by arguing that the "best evidence" under *Hernandez* refers only to prosecutorial demeanor exhibited "during the questioning of the challenged juror," not during the *Batson* hearing. Resp., at 31. But *Hernandez*—the sole case Haynes cites—says no such thing. To the contrary, *Hernandez* clearly relied on the prosecutor's demeanor at the *Batson* hearing to determine "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S., at 365 (plurality op.); *see also Miller-El v. Cockrell*, 537 U.S.

322, 339 (2003) ("*Miller-El I*") (noting that "[c]redibility can be measured by, among other factors, the prosecutor's demeanor").[1]

Haynes's explanation of *Hernandez* also defies logic. It would have made no sense for this Court to have emphasized prosecutor demeanor during *voir dire*. After all, the juror demeanor in question might have been displayed while *defense counsel* was interviewing the juror—as happened in this case. App., at 187. There would have been no reason for the judge to focus on the prosecutor's demeanor at that time.

Moreover, the ruling below violates basic *Batson* principles in yet another way. The "ultimate burden" to prove racial motivation "rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Yet that burden is eviscerated under the decision below. If the Fifth Circuit is correct, then an opponent of a juror strike based on demeanor is automatically entitled to relief whenever the judge who rules on the *Batson* challenge did not personally view the demeanor of the juror. This reversal of the burden of proof finds no support in

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1. Courts of appeals have likewise rejected Haynes's reading of *Hernandez*. *See, e.g.*, *Bryant v. Speckard*, 131 F.3d 1076, 1078 (CA2 1997) ("After . . . observing the prosecutor's testimony [during the *Batson* hearing], the state court judge found the prosecutor to be credible in his assertion that the challenge was not based on the juror's race."); *United States v. Perez*, 35 F.3d 632, 636 (CA1 1994) (upholding denial of *Batson* challenge because district court "was able to assess the prosecutor's demeanor at the moment the explanation was given").

this Court's established *Batson* jurisprudence and turns our legal system on its head, by presuming that a criminal conviction is invalid unless proven otherwise.

Haynes counters that relief is appropriate even in the absence of a judicial finding of a racially motivated strike, citing three lower court rulings. *See* Resp., at 9 (citing *Bui v. Haley*, 321 F.3d 1304 (CA11 2003); *Henderson v. Walls*, 296 F.3d 541 (CA7 2002); *Simmons v. Beyer*, 44 F.3d 1160 (CA3 1995)). The Fifth Circuit relied on none of these rulings—and for good reason. In *Bui*, the court granted a new trial only because, even after another opportunity on remand, the prosecutor failed to articulate *any* race-neutral reason for striking a juror. 321 F.3d, at 1315-16. And in *Henderson*, the court required a new *Batson* hearing—not a new trial—when the state court erroneously refused to require a race-neutral explanation. 296 F.3d, at 550. Finally, in *Simmons*, the court deemed the *Batson* challenge unreviewable, and therefore granted a new trial, because the voir dire transcript was lost and could not be reconstructed a decade later. 44 F.3d, at 1168-69, 1171. In other words, in *Simmons* there was no evidence of any kind with which to judge the race-neutrality of the strike, including the prosecutor's reasons and any allegations of pretext. Here, by contrast, the "best evidence" under *Batson*, the demeanor of the prosecutor, was available to the trial court and the entire jury selection process was recorded in the transcript. The ruling in *Simmons* also drew a strong dissent joined by then-Judge Alito, which condemned the fact that Mr. Simmons "is receiving relief in the face of the panel's

acknowledgment that it does 'not and cannot know whether Simmons' jury selection process was infected by racial discrimination.'" *Id.*, at 1177 (Greenberg, J., dissenting to denial of reh'g en banc).

Third, Haynes complains that the trial court concluded that the strike was race-neutral without specifying that the court was crediting the prosecutor's reliance on juror demeanor. Resp., at 19-20. But juror demeanor was the only reason offered by the prosecutor. And Haynes himself did not object to the form of the court's ruling at trial. "As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling . . . in the form of a clear rejection or acceptance of a *Batson* challenge." *Messiah v. Duncan*, 435 F.3d 186, 198 (CA2 2006) (noting that a trial court "need not engage in a talismanic recitation of specific words in order to satisfy *Batson*") (internal quotation marks omitted); *see Braxton v. Gansheimer*, 561 F.3d 453, 456, 466 (CA6 2009); *McKinney v. Artuz*, 326 F.3d 87, 100 (CA2 2003); *cf. Riley v. Taylor*, 277 F.3d 261, 321 (CA3 2001) (en banc) (Alito, J., dissenting) ("[N]either *Batson* nor any later Supreme Court . . . case suggests that a federal habeas court is free to reject the factual findings of a state court if the state court does not *comment* on all of the evidence or provide what the federal court regards as a satisfactory explanation for its finding.") (emphasis in original).

II. LOWER COURTS ARE DIVIDED OVER THE MEANING OF *SNYDER*.

In *Snyder*, the Court considered a peremptory strike that the prosecutor attempted to justify by asserting two facially race-neutral explanations: the juror's teaching obligations, and the juror's nervous demeanor. 128 S.Ct., at 1208-09. The trial court did not specify which reason it credited in rejecting the *Batson* challenge. This Court subsequently found the first reason pretextual. And because the trial court's denial of Mr. Snyder's *Batson* objection could have been based entirely on the pretextual reason, the Court concluded it could not "presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." *Id.*, at 1209; *see also id.*, at 1212 ("[T]he record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone.").

In *Snyder*, this Court "did not reverse Snyder's conviction because the district court had failed to explain itself clearly, but because it was unclear whether the district court's finding rested on a plausible or implausible explanation for the strike." *United States v. Prather*, 279 Fed. Appx. 761, 767 (CA11 2008). However, a number of courts have misread *Snyder* by giving undue emphasis to the majority's statement that, when assessing a demeanor-based explanation, "the trial court must evaluate . . . *whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.*" 128 S.Ct., at 1208 (emphasis added).

The Fifth and Seventh Circuits have elevated this dicta to a new constitutional mandate requiring specific findings based on demeanor, even when—unlike in *Snyder*—the demeanor-based explanation is the sole reason offered. *Haynes v. Quarterman*, 526 F.3d 189, 199 (CA5 2008) ("*Haynes I*"); *United States v. McMath*, 559 F.3d 657, 665-66 (CA7 2009); *see also McCurdy v. Montgomery Co.*, 240 F.3d 512, 521 (CA6 2001) (adopting similar rule pre-*Snyder*). By contrast, the Eighth and Eleventh Circuits have expressly rejected the claim that *Snyder* requires trial courts to "make detailed credibility findings in the third step of the three-part *Batson* test." *Cook v. City of Bella Villa*, 582 F.3d 840, 854 (CA8 2009) (citing *Smulls v. Roper*, 535 F.3d 853, 860 (CA8 2008) (en banc)); *see Prather*, 279 Fed. Appx., at 767 (rejecting argument that *Snyder* requires trial courts "to make on-the-record findings regarding the credibility of the prosecutor's explanations").

State courts are also closely split over *Snyder*, with Texas, Kentucky, and New Jersey following the Fifth Circuit's reading. *See Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 518 (Tex. 2008); *Frye v. Commonwealth*, No. 2007-CA-002030-MR, 2008 WL 4998794, *3 (Ky. App. 2008) (relying on *Haynes I* and *Snyder* to reverse denial of *Batson* challenge where trial court credited demeanor-based explanation but noted "that it had not personally noticed anything negatively noteworthy about Juror X"); *State v. Osorio*, 952 A.2d 1112, 1120 (N.J. App. 2008) (relying on *Snyder* to overturn denial of *Batson* challenge where trial judge credited prosecutor's explanation that she struck jurors for

giggling, making faces, and "high-fiving" each other but did not "make an express finding that the conduct of jurors . . . described by the assistant prosecutor had actually occurred"). California, Mississippi, and New York, however, reject the Fifth Circuit's interpretation. *See People v. Bramit*, 210 P.3d 1171, 1184 n.7 (Cal. 2009) ("[*Snyder*] did not hold that deference is only permissible when an express determination [regarding the credibility of a demeanor-based explanation] was made below."); *Pruitt v. State*, 986 So.2d 940, 945 n.3 (Miss. 2008) (rejecting that *Snyder* requires "that an appellate court should not defer to a trial court which did not make specific findings of fact on the record for each race-neutral reason proffered"); *People v. Miles*, 864 N.Y.S.2d 28, 29 (N.Y. App. 2008) ("We do not read [*Snyder*] as absolutely prohibiting a trial court from accepting a demeanor-based reason as nonpretextual unless the court personally observes the demeanor trait cited by the challenging party (*but see Haynes v. Quarterman*, 526 F.3d 189, 198-200 [5th Cir. 2008]).").

Snyder's meaning has caused division even within two state supreme courts. *Compare Pruitt*, 986 So.2d at 949 (Diaz, P.J., dissenting) (arguing that *Snyder* prohibits deference unless trial court makes specific findings as to each race-neutral explanation), *with id.*, at 945 n.3 ("This is a generalization and overstatement simply not found in *Snyder*."); *and compare Davis*, 268 S.W.3d, at 518 (reading *Snyder* to require "that the [nonverbal] communication be proved and reflected in an appellate record"), *with id.*, at 528 (Brister, J., concurring) (opining that majority's reading of *Snyder* "goes overboard by prohibiting peremptory strikes based on a juror's nonverbal conduct unless (1) the

conduct is identified on the record 'with some specificity,' and (2) the juror is questioned about it") (quoting *id.*, at 518).

The *Davis* concurrence dramatically captures the practical difficulties that accompany the majority's interpretation of *Snyder*, which requires that

> attorneys must publicly announce any reaction they saw on the record, question the juror about it, allow opposing counsel to rebut, and obtain a ruling that the conduct occurred. This sounds like a good way to antagonize jurors; any attorney who complies can expect exchanges like the following:
>
> | | |
> |---|---|
> | Counsel: | Juror No. 7, I notice that you are yawning. Why is that? |
> | Juror No. 7: | I wasn't yawning. |
> | Counsel: | Judge, I want the record to reflect that Juror No. 7 was yawning, even though he denies it. |
> | Opposing Counsel: | No he was not. |
> | Counsel: | Yes he was. Judge, may I have a ruling? |
> | Court: | I wasn't watching him, so your request is denied. And now you can't strike Juror No. 7, even though |

> you have thoroughly embarrassed him.

Id., at 528-29 (Brister, J., concurring).

"If the Constitution requires precise specification and explicit interrogation about [jurors'] nonverbal reactions, it is odd that the Supreme Court has never said so." *Id.* Indeed, if *Snyder* means what the Fifth Circuit proclaimed, it is a watershed decision that imposes significant changes in *Batson* procedure. Until the Court clarifies *Snyder*'s meaning, courts nationwide will remain deadlocked as to whether *Snyder* imposes a novel constitutional mandate not previously discussed in *Batson* or its progeny.

III. HAYNES'S FACT-BASED ARGUMENTS ARE IRRELEVANT TO THE QUESTIONS PRESENTED AND SHOULD BE ADDRESSED BY THE FIFTH CIRCUIT ON REMAND.

In an effort to avoid the panel's significant errors of law, Haynes urges this Court to determine in the first instance whether the trial court's credibility finding was an unreasonable determination of fact under AEDPA §2254(d)(2). Resp., at 10-16. This is precisely the analysis that the Fifth Circuit declined to perform, *Haynes II*, 561 F.3d at 541—as Haynes eventually concedes, Resp., at 16. Rather than waste its scarce resources on this previously unaddressed argument, the Court should remand to allow the Fifth Circuit to consider it in the first instance, giving appropriate

AEDPA deference to the trial court's credibility determination.[2]

* * * *

Granting Haynes a new trial flouts both the AEDPA and this Court's precedents. "At bottom, the panel orders the release of a murderer . . . subject only to the possibility that somehow the state can retry him [12] years after the murder." *Simmons*, 44 F.3d, at 1178 (Greenberg, J., dissenting to denial of reh'g en banc) (joined by Alito, J.). The decision below should not be allowed to stand.

CONCLUSION

The Court should summarily reverse the judgment below, or in the alternative, grant the petition for certiorari.

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2. Haynes's claim that the AEDPA does not require "deference," Resp., at 17, is perplexing, as the Court itself has used the same shorthand. *See Miller-El I*, 537 U.S., at 340 (2003) ("AEDPA deference"); *Waddington v. Sarausad*, 129 S.Ct. 823, 833 (2009) ("deferential lens of AEDPA").

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